TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 70

UNITED STATES, APPELLANT,

vs.

PARKE, DAVIS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED DECEMBER 10, 1958

JURISDICTION NOTED FEBRUARY 24, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 567

UNITED STATES, APPELLANT,

VS.

PARKE, DAVIS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064-57

UNITED STATES OF AMERICA, Plaintiff,

v.

PARKE, DAVIS AND COMPANY, Defendant

COMPLAINT—Filed May 2, 1957.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, bring this civil action against the above named defendant and complains and alleges as follows:

First Cause of Action

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act (15 U.S.C., Sec. 4), in order to prevent and restrain the continuing violations by the defendant, as hereinafter alleged, of Sections 1 and 3 of the Sherman Act.

2. The defendant transacts business and is found within the District of Columbia.

II

The Defendant

3. Parke, Davis and Company (hereinafter referred to as Parke, Davis) is hereby made a defendant. It is a corporation organized and existing under the laws of the

State of Michigan with its principal place of business at Detroit, Michigan.

[fol. 2] 4. The acts alleged in this complaint to have been done by the defendant corporation were authorized, ordered or done by the officers, agents or employees of said corporation.

III

Co-Conspirators

5. Various drug wholesaling corporations, not made defendants herein, participated as co-conspirators with the defendant in the offense hereinafter charged through their officers, agents and employees who performed acts and made statements in furtherance of said offense. These co-conspirators are sometimes hereinafter referred to collectively as wholesaler co-conspirators and include the following corporations engaged in the business of wholesaling pharmaceutical products in the District of Columbia and the State of Virginia:

(a) District Wholesale Drug Corporation—Washington, D. C.
(b) Washington Wholesale Drug Exchange, Inc.—Washington, D. C.
(c) The Henry B. Gilpin Company, Inc.—Washington, D. C.
(d) Powers-Taylor Drug Company—Richmond, Virginia
(e) Murray Wholesale Drug Company—Norfolk, Virginia

6. Various other persons, firms and corporations not made defendants herein have also participated as co-conspirators with the defendant and wholesaler co-conspirators in the offense hereinafter charged and have performed acts and made statements in furtherance thereof. These co-conspirators are sometimes hereinafter referred to as retailer co-conspirators and include various retail druggists conducting business as retail druggists in the District of Columbia and the State of Virginia.

IV

Definitions

7. Wherever any of the following terms shall be used in this complaint it shall be deemed to have the meaning hereinafter defined:

(a) "Pharmaceutical products" means prescription and non-prescription drugs and medicines, and includes vitamins.

(b) "Wholesaler" means a person, firm, or corporation purchasing pharmaceutical products for resale to retailers thereof.

[fol. 3] (c) "Retailer" means a person, firm, or corporation purchasing pharmaceutical products for resale to ultimate consumers.

V

Nature of Trade and Commerce

8. The defendant Parke, Davis is one of the country's principal manufacturers and distributors of pharmaceutical products. Parke, Davis has its principal plant for the manufacture of pharmaceutical products in the State of Michigan. It sells and distributes in interstate commerce from said principal plant large quantities of its products to wholesalers and retailers in the District of Columbia, in the State of Virginia, and in the other States of the United States.

9. The defendant has organized branch offices in various sections of the United States through which it sells and distributes its products to wholesalers and retailers. The Baltimore branch office, under the supervision of the home office in Detroit, sells and distributes the products of defendant Parke, Davis to wholesalers and retailers in the District of Columbia, in Virginia, and in other States within its territory.

10. There are two channels utilized by the defendant Parke, Davis to accomplish the sale and distribution of its products to the ultimate consumers in the District of Columbia and in Virginia. One channel leads from the

defendant Parke, Davis, through wholesalers, to retailers and thence to consumers. When this channel is used the wholesaler places orders for and receives shipments of the defendant's products from the Baltimore branch office of the defendant or directly from its principal plant in Michigan.

11. The other channel leads from the defendant Parke, Davis directly to retailers, and thence to ultimate consumers. When this channel is used the retailer places orders for and receives shipments of the defendant's products direct from the defendant's Baltimore branch office, or directly from the defendant's principal plant in Michigan. Wholesalers neither place any charge upon nor receive any profits from these direct sales to the retailers.

[fol. 4] 12. In selling its pharmaceutical products directly to retailers, defendant Parke, Davis is acting as a wholesaler and competing with wholesalers to whom it sells its pharmaceutical products for resale to retailers.

VI

Offense Charged

13. Beginning in or about July 1956, and continuing thereafter up to and including the date of the filing of this complaint, the defendant, the co-conspirators herein named, and others to the plaintiff unknown, knowingly have entered into and engaged in an unlawful combination and conspiracy to establish, maintain, enhance, and fix the wholesale and retail prices on pharmaceutical products manufactured by defendant Parke, Davis in unreasonable restraint of the hereinbefore described trade and commerce within the District of Columbia and between the District of Columbia, the State of Virginia and the several States, and in violation of Sections 1 and 3 of the Act of Congress of July 2, 1890, as amended (15 U.S.C., Secs. 1 and 3) commonly known as the Sherman Act. Said unlawful combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and con-

cert of action among the defendant, co-conspirators and others to the plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) That on sales of pharmaceutical products manufactured by defendant Parke, Davis the wholesaler co-conspirators and retailer co-conspirators will adhere to resale prices fixed by defendant Parke, Davis;

(b) That the defendant and the wholesaler co-conspirators will refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who do not agree to adhere to resale prices fixed by defendant Parke, Davis;

[fol. 5] (c) That the retailer co-conspirators will not advertise pharmaceutical products manfactured by defendant Parke, Davis at prices lower than the resale prices fixed by defendant Parke, Davis;

(d) That the defendant and the wholesaler co-conspirators will refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who advertise such products at prices lower than the resale prices fixed by defendant Parke, Davis;

(e) That the defendant will induce, coerce and compel wholesalers not to sell pharmaceutical products manfactured by defendant Parke, Davis to retailers who sell or advertise such products at prices lower than the resale prices fixed by defendant Parke, Davis; and

(f) That defendant and the wholesaler co-conspirators will sell pharmaceutical products manfactured by defendant Parke, Davis only to retailers licensed to fill or dispense prescriptions.

15. During the period of time covered by this complaint and for the purpose of effectuating the aforesaid combination and conspiracy, the defendant and the co-conspirators, by agreement, understanding, and concert of action, have done the things which, as hereinbefore alleged, they combined and conspired to do.

VII

Effects

16. The aforesaid combination and conspiracy has had the effects, among others, of:

(a) Forcing consumers to pay high, arbitrary and noncompetitive prices for pharmaceutical products manufactured by defendant Parke, Davis; and

(b) Preventing retailers from filling prescriptions for pharmaceutical products manufactured by defendant Parke, Davis.

[fol. 6] Second Cause of Action

17. Each and every allegation contained in this complaint in paragraph numbers 1 through 12; except paragraphs 5 and 6, is here realleged.

I

Co-Conspirator

18. The Washington Wholesale Drug Exchange, Inc., not made a defendant herein, participated as a co-conspirator in the offense hereinafter charged through its officers, agents and employees who performed acts and made statements in furtherance of said offense.

II

Offense Charged

19. Beginning in or about October 1955, the exact date being to the plaintiff unknown, and continuing to and including the date of the filing of this complaint defendant and co-conspirator, together with other persons to the plaintiff unknown, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce within the District of Columbia and between the District of Columbia and the several States, and in violation of Section 3 of the Act of Congress of July 2, 1890, as amended (15 U.S.C., Sec. 3) commonly known as the Sherman Act.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action between defendant and co-conspirator, the substantial term of which has been and is that they agree that the granting of discounts or dividends to retailers on their purchases from the co-conspirator of pharmaceutical products manufactured by defendant Parke, Davis be discontinued.

21. During the period of time covered by this complaint and for the purpose of effectuating the aforesaid combination and conspiracy, the defendant and the co-conspirator, by agreement, understanding, and concert of action, have done the things which, as hereinbefore alleged, they combined and conspired to do.

III

Effects

22. The aforesaid combination and conspiracy has had the effects, among others, of:

[fol. 7] (a) Eliminating price competition between defendant Parke, Davis and the co-conspirator.

(b) Denying discounts and dividends to retailers on their purchases from the co-conspirator of pharmaceutical products manufactured by defendant Parke, Davis.

(c) Preventing retailers from passing on to consumers the benefits of discounts on pharmaceutical products manufactured by defendant Parke, Davis.

Prayer

Wherefore, the plaintiff prays:

1. That the Court adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act.

2. That the defendant, its officers, directors, agents and employees, and all persons acting or claiming to act on behalf of the defendant be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, the combination and conspiracy to restrain the

sale and distribution of pharmaceutical products as herein before alleged, or any similar combination or conspiracy to restrain the trade and commerce in the sale and distribution of pharmaceutical products.

3. That defendant, its officers, directors, agents and employees, be perpetually enjoined from boycotting, attempting to boycott, persuading or inducing others to boycott, any person, firm, or corporation because said person, firm or corporation sells or advertises for sale pharmaceutical products below defendant's suggested resale price.

4. That defendant, its officers, directors, agents and employees, be perpetually enjoined from refusing to sell, persuading or inducing others to refuse to sell pharmaceutical products of the non-prescriptive class to persons, firms, or corporations who are not licensed to fill or dispense prescriptions.

5. That defendant, its officers, directors, agents and employees, be perpetually enjoined from boycotting, or attempting to boycott, any person, firm or corporation en- [fol. 8] gaged in the business of wholesaling pharmaceutical products because said person, firm or corporation grants discounts or dividends to retailers who purchase defendant's pharmaceutical products.

6. That the plaintiff recover the costs of this action.

Edward R. Kenney, Herbert F. Peters, Jr., Marshall C. Gardner, Richard C. Shadyac, Attorneys, Department of Justice.

Herbert Brownell, Jr., Attorney General.
Victor R. Hansen, Assistant Attorney General.
Oliver Gasch, United States Attorney.
Worth Rowley, Attorney, Department of Justice.

[fol. 9] [File endorsement omitted]

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER OF DEFENDANT PARKE, DAVIS & COMPANY—Filed May 23, 1957.

The defendant Parke, Davis & Company (hereinafter referred to as "Parke, Davis") by its undersigned attorneys answers the Complaint herein as follows:

First Cause of Action

1. Parke, Davis admits the Complaint is filed and this action is instituted under Section 4 of the Sherman Act. Except as to those facts specifically admitted, Parke, Davis denies the allegations of paragraph 1 of the Complaint.

2. Parke, Davis admits the allegations of paragraph 2 of the Complaint.

3. Parke, Davis admits the allegations in paragraph 3 of the Complaint.

4. Parke, Davis denies each and every allegation of paragraph 4 of the Complaint.

5. Parke, Davis admits that various drug wholesaling corporations, are not made defendants in this action and are sometimes referred to in the Complaint by the Pleader collectively as wholesaler co-conspirators. Parke, Davis is without knowledge or information sufficient to form a belief as to whether the drug wholesaling corporations listed in paragraph 5 of the Complaint engaged in the business of wholesaling pharmaceutical products in the [fol. 10] District of Columbia and the State of Virginia. Parke, Davis denies each and every other allegation of paragraph 5 of the Complaint.

6. Parke, Davis admits that the Pleader sometimes refers to various persons, firms, and corporations not made defendants as retailer co-conspirators but is without knowledge or information sufficient to form a belief as to whether such retail druggist conducted business in the District of Columbia and the State of Virginia. Parke, Davis denies

each and every other allegation of paragraph 6 of the Complaint.

7. This paragraph does not require an answer.

8. Parke, Davis admits the allegations of paragraph 8.

9. Parke, Davis admits the allegations of paragraph 9 of the Complaint, except it denies that all activities of the Baltimore Brance Office in the sale and distribution of Parke, Davis products are under the supervision of the Home Office in Detroit.

10. Parke, Davis admits and avers that wholesalers place orders for and receive shipments of its products from the Baltimore Branch Office of Parke, Davis occasionally in emergency situations or directly from the company's plant in Michigan. Except as admitted, Parke, Davis denies each and every other allegation of paragraph 10 of the Complaint.

11. Parke, Davis admits that retailers place orders for and receive shipments of its products direct from the Baltimore Branch Office of Parke, Davis or from its principal plant in Michigan and that wholesalers neither place any charge upon nor receive any profit from direct sales by Parke, Davis to retailers. Except as admitted, Parke, Davis denies each and every other allegation of paragraph 11 of the Complaint.

12. Parke, Davis denies the allegations of paragraph 12 of the Complaint.

[fol. 11] 13. Parke, Davis denies each and every allegation of paragraph 13 of the Complaint.

14. Parke, Davis denies each and every allegation of paragraph 14 of the Complaint.

15. Parke, Davis denies each and every allegation of paragraph 15 of the Complaint.

16. Parke, Davis denies each and every allegation of paragraph 16 of the Complaint.

Second Cause of Action

17. In answer to paragraph 17 of the Complaint, Parke, Davis incorporates by reference its answers to paragraphs 1 through 12 of the Complaint, above, except paragraphs 5 and 6.

18. Parke, Davis admits that the Washington Wholesale Drug Exchange, Inc. is not made a defendant. Parke,

Davis denies each and every allegation of paragraph 18 of the Complaint.

19. Parke, Davis denies each and every allegation of paragraph 19 of the Complaint.

20. Parke, Davis denies each and every allegation of paragraph 20 of the Complaint.

21. Parke, Davis denies each and every allegation of paragraph 21 of the Complaint.

22. Parke, Davis denies each and every allegation of paragraph 22 of the Complaint.

Wherefore, Parke, Davis denies that the plaintiff is entitled to the relief prayed for in the Complaint or any part thereof, or to any other relief against Parke, Davis, and prays for judgment dismissing both counts of the [fol. 12] Complaint herein with the costs and disbursements of this action.

Gerhard A. Gesell, John H. Schafer, 701 Union Trust Building, Washington 5, D. C., Attorneys for Defendant Parke, Davis & Company By Gerhard A. Gesell.

Covington & Burling, Of Counsel.

[fol. 13] Certificate of Service (Omitted in Printing)

[fol. 14] [File endorsement omitted]

In the United States District Court for the District of Columbia

[Title omitted]

Interrogatories to Plaintiff—Filed December 18, 1957

To: Edward R. Kenney, Department of Justice, Washington 25, D. C.

The following interrogatories are addressed to you pursuant to Rule 33 of the Federal Rules of Civil Procedure. You are required to answer these interrogatories in

writing under oath and to serve a copy thereof on Gerhard A. Gesell, 701 Union Trust Building, Washington 5, D. C., attorney for defendant, within 15 days after service of these interrogatories.

First Cause of Action

I

With respect to paragraph 5 of the complaint alleging that various drug wholesaling corporations participated as co-conspirators in the offenses charged in paragraphs 13, 14 and 15 of the complaint, and that those alleged wholesaler co-conspirators include five named corporations engaged in the business of wholesaling pharmaceutical products in the District of Columbia and the State of Virginia, state:

[fol. 15] (a) Whether plaintiff claims that other drug wholesaling corporations, whether or not engaged in such business in the District of Columbia or the State of Virginia, are claimed to be co-conspirators with the defendant in any of the offenses charged in paragraphs 13, 14 and 15 of the complaint and, if so, give their names and addresses.

(b) Whether plaintiff claims that each alleged wholesaler co-conspirator entered into each of the agreements alleged in subparagraphs (a), (b), (d) and (f) of paragraph 14 and, if not, identify the particular agreement which it is claimed the said wholesaler co-conspirator entered into with defendant.

II

With respect to paragraph 6 of the complaint alleging that other persons, firms and corporations have also participated as co-conspirators with the defendant and wholesaler co-conspirators in the offenses charged and performed acts and made statements in furtherance thereof, state:

(a) The names and addresses of all such other persons, firms and corporations claimed by plaintiff to have participated as co-conspirators in the offenses charged in paragraphs 13, 14 and 15 of the complaint.

(b) Whether all the said other persons, firms and corporations are retail druggists conducting business as retail druggists in the District of Columbia or in the State of Virginia.

[fol. 16] (c) Whether it is claimed that each of said other persons, firms and corporations entered into each of the agreements alleged in subparagraphs (a) through (f) of paragraph 14 of the complaint and, if not, identify the particular agreement which is claimed the said other person, firm or corporation entered into with defendant.

III

With respect to paragraph 13 of the complaint alleging that, beginning in or about July, 1956, and continuing thereafter up to and including the date of the filing of the complaint in this action, the defendant and the named co-conspirators knowingly entered into and engaged in an unlawful combination and conspiracy to establish, maintain, enhance and fix the wholesale and retail prices on Parke, Davis pharmaceutical products in unreasonable restraint of trade and commerce within the District of Columbia and between the District of Columbia, the State of Virginia, and the several States, and that said unlawful combination and conspiracy is continuing and will continue unless the relief prayed for in the complaint is granted, state:

(a) The date on which it is claimed each alleged co-conspirator entered into the said unlawful combination and conspiracy.

(b) Whether it is claimed that the wholesale and retail prices of all the pharmaceutical products manufactured by defendant Parke, Davis were the subject of the said unlawful combination and conspiracy and, if not, name the Parke, Davis pharmaceutical [fol. 17] products which it is claimed were the subject of the alleged unlawful combination and conspiracy.

IV

With respect to paragraph 14 of the Complaint alleging that the charged combination and conspiracy has consisted of a continuing agreement, understanding and concert

of action between the defendant and the alleged co-conspirators with six separate substantial terms, state:

(a) Whether it is claimed that there was a single agreement between the defendant and the alleged co-conspirators embodying all six of the terms set out in subparagraphs (a) through (f) of paragraph 14, or whether it is claimed that there were several separate agreements made, each embodying one or more of the terms so alleged, and if several separate agreements are alleged, state as to each such agreement the substantial terms thereof.

(b) The date, or approximate date, upon which it is claimed each of the alleged substantial terms were agreed to.

(c) The parties claimed to agree to each of the said substantial terms.

(d) Whether it is claimed that other alleged co-conspirators subsequently agreed to adhere to the said substantial terms and, if so, give the date of such adherence.

[fol. 18] (e) Whether it is claimed that any of the agreements alleged in subparagraphs (a) through (f) of paragraph 14 of the complaint are currently in existence between defendant and any other person, firm or corporation and, if so, state which of said agreements are claimed currently to exist and state the names of the parties to each such claimed agreement.

V

With respect to paragraph 15 of the complaint alleging that the defendant and the co-conspirators have done the things it is alleged in paragraph 14 they combined and conspired to do, and:

(a) With respect to subparagraph (a) of paragraph 14, alleging that one of the substantial terms of the alleged combination and conspiracy is that on sales of Parke, Davis pharmaceutical products the wholesaler and retailer co-conspirators will adhere to resale prices fixed by defendant, state:

(i) Whether the term "resale prices" in said allegation is intended to mean the list price quoted

by Parke, Davis in its catalogue, or whether it is intended to mean the suggested minimum resale price on Parke, Davis pharmaceutical products also stated in the Parke, Davis catalogue.

(b) With respect to subparagraph (b) of paragraph 14, alleging that one of the substantial terms of the alleged combination and conspiracy is that the defendant and the wholesaler co-conspirators will refuse [fol. 19] to sell Parke, Davis pharmaceutical products to retailers who do not agree to adhere to resale prices fixed by the defendant, state:

(i) The name or names of the retailer or retailers to whom the defendant and the wholesaler co-conspirators refused to sell.

(ii) The date or dates on which such refusals to sell were made.

(c) With respect to subparagraph (c) of paragraph 14, alleging that one of the substantial terms of the alleged combination and conspiracy is that the retailer co-conspirators will not advertise Parke, Davis pharmaceutical products at prices lower than resale prices fixed by defendant, state:

(i) Whether it is claimed the said retailer co-conspirators did, in fact, fail to advertise Parke, Davis pharmaceutical products at prices lower than resale prices fixed by defendant during the entire term of the alleged combination and conspiracy and, if not, give the dates during which the said retailer co-conspirators failed to so advertise said products as a result of the alleged agreement.

(ii) Whether it is claimed that all the named retailer co-conspirators failed to so advertise said products and, if not, state the names of the retailer co-conspirators who did fail to so advertise said products.

[fol. 20] (iii) Whether it is claimed that all Parke, Davis pharmaceutical products were the subject of the agreement alleged in this subparagraph and, if not, name the said products which are claimed

to have been the subject of the said alleged agreement.

(d) With respect to subparagraph (d) of paragraph 14, alleging that one of the substantial terms of the alleged combination and conspiracy is that the defendant and the wholesaler co-conspirators will refuse to sell Parke, Davis pharmaceutical products to retailers who advertise such products at prices lower than the resale prices fixed by the defendant, state:

(i) The name or names of the retailer or retailers to whom it is claimed the defendant or the wholesaler co-conspirators refused to sell pursuant to this term of the alleged unlawful agreement, understanding or concert of action.

(ii) The date or dates on which it is claimed such refusals to sell were made, and by whom.

(e) With respect to subparagraph (e) of paragraph 14 alleging that one of the substantial terms of the alleged combination and conspiracy is that the defendant will induce, coerce and compel wholesalers not to sell Parke, Davis pharmaceutical products to retailers who sell or advertise such products at prices lower than the resale prices fixed by the defendant, state:

[fol. 21] (i) The name or names of the wholesaler or wholesalers it is claimed were so induced, coerced or compelled by the defendant,

(f) With respect to subparagraph (f) of paragraph 14 alleging that one of the substantial terms of the alleged combination and conspiracy is that the defendant and the wholesaler co-conspirators will sell Parke, Davis pharmaceutical products only to retailers licensed to fill or dispense prescriptions, state:

(i) Whether it is claimed that there were refusals to sell to any retailer by reason of this alleged term of the claimed agreement and, if so, state the name or names of the persons who thus refused to sell,

the retailer or retailers to whom such refusals to sell were made, and the date or dates on which each such refusal to sell was made.

VI

1. With respect to subparagraph (a) of paragraph 16 alleging that an effect of the claimed combination and conspiracy has been to force customers to pay high, arbitrary and non-competitive prices for Parke, Davis pharmaceutical products, state:

(a) Whether it is claimed that prices for Parke, Davis pharmaceutical products have been, during the period covered by the complaint, non-competitive with the prices of similar products manufactured by other manufacturers of pharmaceutical products.

[fol. 22] 2. With respect to subparagraph (b) of paragraph 16 of the complaint alleging that an effect of the claimed combination and conspiracy has been to prevent retailers from filling prescriptions for Parke, Davis pharmaceutical products state:

(a) The names and addresses of the retailers who have been so prevented from filling prescriptions for Parke, Davis pharmaceutical products.

(b) The date or dates on which such retailers were so prevented from filling prescriptions for Parke, Davis pharmaceutical products.

(c) Whether it is claimed that retailers not licensed to fill or dispense prescriptions have been prevented from filling prescriptions for Parke, Davis pharmaceutical products by reason of the claimed combination and conspiracy.

Second Cause of Action

VII

With respect to paragraph 19 of the complaint alleging that defendant and co-conspirators, together with other persons to the plaintiff unknown, have engaged in an unlaw-

ful combination and conspiracy in unreasonable restraint of trade and commerce, state:

(a) Whether it is claimed that other persons, firms or corporations participated in the said conspiracy and, if so, give their names and addresses.

VIII

With respect to paragraph 20 of the complaint alleging that the substanial term of the combination and [fol. 23] conspiracy alleged in this paragraph has been and is that the defendant and alleged co-conspirator agree that the granting of discounts or dividends to retailers on their purchases from the co-conspirator of Parke, Davis pharmaceutical products be discontinued, state:

(a) The particular discounts or dividends normally granted by the alleged co-conspirator which are alleged to be the subject of the said combination and conspiracy.

IX

With respect to paragraph 21 of the complaint alleging that the defendant and the co-conspirators did the things which it is alleged they combined and conspired to do, state:

(a) The acts claimed to have been performed and the statements claimed to have been made effectuating the claimed combination and conspiracy.

(b) The date or dates on which it is claimed such acts were done and statements made.

X

1. With respect to subparagraph (b) of paragraph 22 of the complaint alleging that an effect of the combination and conspiracy alleged in the Second Cause of Action has been to deny discounts and dividends to retailers on their purchases from the co-conspirators of Parke, Davis pharmaceutical products, state:

(a) The name or names of the retailers who it is claimed have been denied dividends or discounts by reason of the alleged conspiracy.

2. With respect to subparagraph (c) of paragraph 22 of the complaint alleging that an effect of the combination and conspiracy alleged in the Second Cause of Action [fol. 24] has been to prevent retailers from passing on to consumers the benefits of discounts on Parke, Davis pharmaceutical products, state:

(a) The names of the retailers plaintiff claims to have been thus prevented from passing on to consumers the benefits of discounts on such products.

(b) Whether it is claimed that these retailers did pass on the benefits of discounts to consumers before the effective date of the agreement alleged in paragraph 20 of the complaint.

Submitted by: Gerhard A. Gesell, 701 Union Trust Building, Washington 5, D. C., Attorney for Defendant.

Certificate of Service (Omitted in Printing)

[fol. 25] [File endorsement omitted]

In the United States District Court for the District of Columbia

[Title omitted]

Plaintiff's Answers to Defendant's Interrogatories—

Filed March 17, 1958

First Cause of Action

Interrogatory No. 1

(a) Plaintiff does not claim that any drug wholesaling corporations other than those named as co-conspirators are claimed to be co-conspirators with the defendant.

(b) Plaintiff claims that each alleged wholesaler co-conspirator entered into each of the agreements alleged in

subparagraphs (a), (b), (d), and (f) of Paragraph 14 of the complaint.

II

Interrogatory No. 2

(a) The names and addresses of other persons, firms and corporations claimed by the plaintiff to have participated as co-conspirators in the offenses charged in Paragraphs 13, 14 and 15 of the complaint are:

Babbitt's Cut Rate Drug Store
Washington, D. C.

Dart Drug Corporation
Washington, D. C.

The Drug Mart Group
Washington, D. C.

Peoples Drug Stores
Washington, D. C.

Standard Drug Stores
Washington, D. C. and Richmond, Virginia

[fol. 26] (b) All such persons, firms and corporations are retail druggists conducting business in the District of Columbia or in the State of Virginia.

(c) It is claimed that each of the other persons, firms and corporations mentioned above entered into agreements (a) and (c) of Paragraph 14 of the complaint.

Interrogatory No. 3

(a) The plaintiff is not required to answer this interrogatory.

(b) It is claimed that the wholesale and retail prices of all pharmaceutical products manufactured by defendant were the subject of the unlawful combination and conspiracy.

Interrogatory No. 4

(a) The plaintiff claims that there was an overall conspiracy directed by Parke, Davis to establish, maintain, enhance and fix the wholesale and retail prices on its pharmaceutical products. Under the terms of the conspiracy the

defendant and the wholesaler co-conspirators agreed to boycott retailers who would refuse to adhere to these fixed prices or who would not agree to cease advertising at lower prices than those fixed by the defendant. Each of the co-conspirators played parts in this conspiracy. The retailer co-conspirators engaged in the agreements alleged in subparagraphs (a) and (c) of Paragraph 14. The wholesaler co-conspirators engaged in the agreements alleged in subparagraphs (b), (d), (e) and (f) of Paragraph 14.

(b) The plaintiff is not required to answer this interrogatory.

(c) The parties claim to have agreed to each of the substantial terms are covered in the above answer in 4(a).

(d) The plaintiff is not required to answer this interrogatory.

(e) As hereinafter appears, the agreements alleged in subparagraphs (a) through (e) of Paragraph 14 of the complaint concerning and directed at retailers are presently in existence although all acts in performance thereof were apparently discontinued during the months of September, October and November of 1956 subsequent to the defend- [fol. 27] ant's discovery that the Department of Justice had initiated an investigation into its business practices in the District of Columbia and the Richmond, Virginia area and are not currently being done with one exception. The details of that exception involve subparagraphs (a) and (c) of Paragraph 14 and are as follows. During August of 1956 the defendant and Dart Drug Corporation as well as other retailers entered into oral agreements to the effect that the defendant would resume selling its pharmaceutical products directly, and that wholesaler co-conspirators would be permitted to sell to Dart and other retailers, upon the understanding that the latter would discontinue advertising the defendant's pharmaceutical products at prices below the suggested resale price. Dart, McReynolds, State, Babbitts and Standard had been cut off from direct purchases from the defendant as well as purchases from the wholesaler co-conspirators acting in concert with the defendant because they were selling and advertising pharmaceutical products manufactured by defendant at prices considerably lower than the suggested resale prices. The plaintiff claims that these alternate agreements were ac-

ceptable to the defendant in view of the plaintiff's investigation; moreover, the plaintiff claims that the agreements involving advertising are no less obnoxious to the Sherman Act than the agreement to adhere to resale prices. Subsequent to these agreements, Dart resumed advertising defendant's products at prices lower than suggested resale prices upon learning that other retailers who had similarly entered into agreements with the defendant with respect to advertising resumed advertising at lower prices. The defendant's hand was stayed until the termination of the companion criminal case. In December of 1957 the defendant notified Dart that it would no longer send its field representatives to the former's stores and that orders must be mailed to defendant's Baltimore branch office. In January 1958, Dart received a letter from defendant notifying it that defendant no longer *desire* doing business with it. Plaintiff claims that this refusal to deal dates back to the alleged conspiracy and is a direct effect of it in that Dart breached its agreement not to advertise. The Government further claims that the defendant's action was motivated [fol. 28] by Dart's vigorous price-cutting of defendant's products and revenge against Herbert Haft for testifying against it in the criminal case. Furthermore, the defendant's cutting off of Dart is the type of act against which the complaint specifically prays for relief; that is, "That defendant, its officers, directors, agents, and employees, be perpetually enjoined *from boycotting*, attempting to boycott, persuading or inducing others to boycott, any person, firm or corporation because said person, firm or corporation sells or advertises for sale pharmaceutical products below defendant's suggested resale price.

With respect to subparagraph (a) of Paragraph 14 concerning wholesale prices, the plaintiff claims that agreements between the defendant and wholesaler co-conspirators providing that wholesaler co-conspirators will adhere to resale prices fixed by defendant currently exists.

With respect to subparagraph (f) the plaintiff claims that agreements between the defendant and wholesaler co-conspirators providing that the wholesalers sell pharmaceutical products manufactured by defendant Parke, Davis only to retailers licensed to fill or disperse prescriptions is currently in existence. The parties involved in these vari-

ous agreements in addition to the defendant are set forth in the answer to Interrogatory No. 4.

Interrogatory No. 5

(a)(1) The term "resale prices" alleged in subparagraph (a) of Paragraph 14 is intended to mean the suggested minimum resale price in the Parke, Davis catalog.

(b)(1) The names of the retailers to whom the defendant and the wholesaler co-conspirator refused to sell its products are:

Dart Drug Corporation
McReynolds Pharmacy, Inc.
State Drugs, Inc.
Babbitt's Cut Rate Drug Store
Standard Drug Company, Inc.

(b)(2) The plaintiff is not required to answer this interrogatory.

(c)(1) The plaintiff claims that the retailer co-conspirators failed to advertise Parke, Davis pharmaceutical products at prices lower than the prices fixed by the defendant starting in September 1956.

[fol. 29] (c)(2) It is claimed that all of the named retailer co-conspirators failed to advertise Parke, Davis products.

(c)(3) It is claimed that all Parke, Davis pharmaceutical products were subject to the agreement alleged in subparagraph (c) of Paragraph 14.

(d)(1) The names of the retailers to whom it is claimed the defendant or the wholesaler co-conspirators refused to sell pursuant to the allegations of subparagraph (c) of Paragraph 14 are:

Dart Drug Corporation
McReynolds Pharmacy, Inc.
State Drugs, Inc.
Babbitt's Cut Rate Drug Store
Standard Drug Company, Inc.

(d)(2) The plaintiff is not required to answer this interrogatory.

(e)(1) The names of the wholesalers it is claimed were induced, coerced or compelled by the defendant not to sell

its pharmaceutical products to retailers who sell or advertise such products below the resale prices fixed by defendant are:

District Wholesale Drug Corporation
Washington, D. C.

Washington Wholesale Drug Exchange, Inc.
Washington, D. C.

The Henry B. Gilpin Company, Inc.
Washington, D. C.

Powers-Taylor Drug Company
Richmond, Virginia

Murray Wholesale Drug Company
Norfolk, Virginia

(f)(1) The plaintiff has no present knowledge as to whether there were refusals to sell to any retailer by reason of the alleged term of the agreement set forth in subparagraph (f) of Paragraph 14.

Interrogatory No. 6

(1)(a) The plaintiff is not required to answer this interrogatory.

(2)(a) The names and addresses of the retailers who have been prevented from filling prescriptions for Parke, Davis pharmaceutical products are:

Dart Drug Corporation
McReynolds Pharmacy, Inc.
State Drugs, Inc.
Standard Drug Company, Inc.

[fol. 30] (2)(b) The plaintiff is not required to answer this interrogatory.

(2)(c) It is not claimed that retailers not licensed to fill or dispense prescriptions have been prevented from doing so by reason of the claimed combination and conspiracy.

Interrogatory No. 7

(a) The plaintiff is not required to further answer this interrogatory.

Interrogatory No. 8

(a) The plaintiff is not required to further answer this interrogatory.

Interrogatory No. 9

(a) Plaintiff claims that prior to October of 1955 the Washington Wholesale Drug Exchange, a cooperative corporation, dealing in the defendant's pharmaceutical products, granted preferred discounts to retail druggists who purchased pharmaceutical products, including the defendant's pharmaceutical products. This preferred discount plan was a sharing of the profits program, the effects of which were that wholesale selling prices were lower than the defendant's suggested resale prices. In October of 1955 Parke, Davis representatives induced the Drug Exchange to discontinue these preferred discounts. At the same time it was agreed between Parke, Davis representatives and the Drug Exchange that the latter could grant a 2 per cent discount for cash. Early in 1956 the Drug Exchange was further induced and compelled to discontinue the 2 per cent discount. The parties between whom these agreements were made were Mr. Dripps of the defendant's Baltimore branch office and two of his field representatives, one of whom the plaintiff believes was Richard Cummings, and Howard M. Bradbury, President of the Washington Wholesale Drug Exchange.

Edward R. Kenney, Attorney, Department of Justice.

Subscribed and sworn to before me this day of , 1958.

, , Notary Public

My Commission expires—

[fol. 31] [File endorsement omitted]

[fol. 32] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PRETRIAL PROCEEDINGS—Filed April 2, 1958

Statement of Nature of Case:

The issues are sufficiently stated, in the pretrial statements attached hereto.

It is stipulated that D may offer at trial newspaper advert. without formal proof but subject to objections as to relevancy, materiality and competency.

It is further stip. that counsel for D will submit to counsel for P. any such advert. that D expects to use at the trial.

It is stipulated that as far as Va. is concerned the effects of the alleged conspiracy are confined to the retailers in Richmond, Virginia, area.

It is stipulated that when the term Drug Mart Group is used it refers to a group of drug stores in D.C. who have banded together for the purpose of joint advertising. The Gov. will show that all of these stores thru the agreement of its reps. with the D. abandoned the advertising of products for cut prices during the advertising. Some of these stores may have continued to advert. these products individually.

It is agreed that all discovery proceedings will be concluded within 30 days.

Stipulated that counsel for both sides will sign cert. of readiness immediately after the 30 day discovery period. The Court sets the date of June 2, 1958 as the date for the trial.

F. Dickinson Letts, Judge.

Edward R. Kenney, Gerhard A. Gesell.

[fol. 33] [File endorsement omitted]

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff,

v.

PARKE, DAVIS & COMPANY, Defendant

ORDER DISMISSING SECOND CAUSE OF ACTION—April 2, 1958.

Upon plaintiff's motion to dismiss the Second Cause of Action in the above-entitled cause, it is

Ordered that the Second Cause of Action be and it hereby is dismissed with prejudice.

Dated: April 2, 1958.

F. Dickinson Letts, District Judge.

[fol. 34] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff,

v.

PARKE, DAVIS & COMPANY, Defendant

ORDER ENTERING JUDGMENT FOR DEFENDANT AND DISMISSING COMPLAINT—July 16, 1958

Defendant having moved under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the Complaint at the conclusion of the Plaintiff's case, and the Court having considered the briefs of the parties, reviewed the transcript, heard oral argument, and having concluded that, upon the facts and the law, the Plaintiff has shown no right to relief,

It is Ordered that judgment be entered for Defendant and that the Complaint be and is hereby dismissed in accord-

ance with the Opinion and Findings of Fact and Conclusions of Law filed herewith.

Joseph R. Jackson, United States District Judge,
By Designation.

July 16, 1958.

[fol. 35] United States District Court for the District of Columbia

Civil Action No. 1064-57

United States of America, Plaintiff,

v.

Parke, Davis & Company, Defendant

Opinion—July 16, 1958

This is a proceeding instituted by the United States under Section 4 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, and entitled "An Act to protect trade and commerce against unlawful restraint and monopolies", commonly known as the Sherman Act. It was brought in order to prevent alleged violations by the defendant, Parke, Davis & Company, of Section 1 and 3 of the Act (15 U.S.C., Sections 1 and 3).

In the Complaint it is stated that the defendant, one of the nation's principal manufacturers and distributors of pharmaceutical products, engaged, with various co-conspirators, distributors of defendant's products, in an unlawful combination and conspiracy to establish, maintain, enhance and fix both wholesale and retail prices on defendant's products in interstate commerce throughout the District of Columbia and the State of Virginia in violation of the hereinabove-named sections of the Act. The alleged co-conspirators were not named as defendants.

Plaintiff prayed that defendant be decreed to have combined and conspired as alleged; that it and all claiming to act in its behalf be perpetually enjoined from carrying [fol. 36] out the alleged conspiracy in all respects; and that defendant be enjoined from boycotting, or attempting

to boycott, any person, firm or corporation selling or advertising for sale defendant's products below its suggested resale price. Issue was duly joined by Answer of Defendant.

At the conclusion of plaintiff's case, counsel for defendant moved under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the Complaint; the Court having considered the briefs of the parties, reviewed the transcript, heard oral arguments, and having concluded, upon the facts and the law, that the plaintiff had shown no right to relief, granted the motion, and judgment was ordered accordingly.

It is apparent to the Court, from the testimony and exhibits, that defendant had well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell. It appears that defendant sold its products in the above-mentioned territory directly to retailers through its Baltimore branch in quantity lots at prices less than the retailers could buy from the wholesalers—the latter sold to the retailers primarily in smaller quantities.

It further appears that the sale of defendant's products as compared with the overall sales of like or similar products of other pharmaceutical concerns is very small, but that there is keen competition between its products and those of other producers. Fair Trade laws were not in effect either in the State of Virginia or in the District of Columbia during the pertinent period.

The entire record reveals that representatives of defendant notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defend- [fol. 37] ant's policy. Defendant's representatives likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant. It may be noted that every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others.

The evidence is clear that both wholesalers and retailers valued defendant's business so highly that they acceded to its policy.

It is apparent from what has been said herein that there was no coercion by defendant and no agreement with co-conspirators as alleged in the Complaint. Clearly, the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U.S. v. Colgate & Company*, 250 U.S. 300. That doctrine continues to be the law.

Counsel for the plaintiff contends vigorously that proof of its allegations is implicit in (1) defendant's calling the attention of both retailers and wholesalers to its policy, and (2) the distributors' acquiescence to the policy. The Court cannot agree to such a nebulous deduction from the record before it.

It was shown that defendant, in the fall of 1956, abandoned in good faith its efforts to maintain minimum resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products in the State of Virginia or the District of Columbia. It is clear that, under the long-continuing competitive conditions, neither defendant nor other manufacturer or distributor of like goods could possibly attempt to do so. If they did, there could be no result other than heavy financial loss.

[fol. 38] It is true that the General Counsel of defendant testified that the abandonment of the required sales prices was in some measure concerned with defendant's having learned that the Anti-Trust Division of the Department of Justice was looking into its business, but he stated positively, in effect, that it was not the chief or moving factor in its action of abandonment. It is evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field.

There can be no doubt from what has been stated herein that, even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from doing as alleged when there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can pos-

sibly be repeated, would be an empty gesture. *U.S. v. Hamburg-Amerikanische Co.*, 239 U.S. 466 (1916).

In view of the Court's opinion as hereinbefore set forth, there follows its Findings of Fact and Conclusions of Law:

Findings of Fact

1. The defendant, Parke, Davis & Company (hereinafter referred to as Parke, Davis) is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at Detroit, Michigan. It transacts business and is found within the District of Columbia. It maintains a branch office at Baltimore, Maryland, to which pharmaceutical products are sent in interstate commerce from its principal plant in Michigan. These products are then distributed in interstate commerce from its Baltimore office to various drug wholesalers and retailers, including drug wholesalers and retailers in the District of [fol. 39] Columbia and the State of Virginia. The Baltimore branch office operates in accordance with policies laid down by the Company's home office in Detroit.

2. Parke, Davis manufactures approximately 600 different pharmaceutical products, including both prescription and non-prescription items. In 1956, the total dollar volume of its sales in the District of Columbia and Richmond, Virginia, was as follows:

	To Retailers	To Wholesalers
District of Columbia	$499,304	$161,247
Richmond, Virginia	$ 58,870	$113,651

3. Parke, Davis' sales constitute less than 5% of the sales of pharmaceutical products in the District of Columbia and Richmond, Virginia. There are about 2,000 different drug manufacturers selling about 178,000 different drug items in the District of Columbia.

4. Plaintiff makes no claim that the prices for Parke, Davis products are not competitive with similar products produced by other pharmaceutical manufacturers. Parke, Davis' products are sold in the District of Columbia and the State of Virginia in intense competition with the products of other manufacturers.

5. Retailers may buy Parke, Davis products either directly from Parke, Davis or from wholesalers. Ordinarily,

their large volume purchases are made from Parke, Davis which offers a lower quantity price on some of its products than the wholesalers offer. The wholesalers, on the other hand, provide the retailers the convenience of smaller quantity purchases, day-to-day service, and a wide variety of products of many different manufacturers.

6. During the period covered by the Complaint, there were no Fair Trade laws in effect in either the District of [fol. 40] Columbia or the State of Virginia.

7. Suggested minimum resale prices were unilaterally established by Parke, Davis for retailers and wholesalers in the District of Columbia and Virginia and elsewhere, and were published to the trade long before the summer of 1956.

8. The Parke, Davis catalogue for retailers contained the following statement under the heading "Minimum Retail Pricing Applying to Parke, Davis Products"

> "The Minimum Retail Prices herein set forth or in the Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those States which have not enacted Fair Trade Laws."

9. The Parke, Davis catalogue for wholesalers contained the following statement under the heading "Wholesale Drug Trade Sales and Distribution Policy"

> "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe the Net Price Selling Schedule in this Parke, Davis & Company Wholesale Drug Trade Biller's Price List and Supplements, and who confine their distribution of Parke, Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions."

10. Parke, Davis did not have any regularized or systematic machinery for maintaining its suggested minimum prices as to either retailers or wholesalers. It did not regularly "shop" stores, maintain card index files, or in any other manner police its suggested minimum prices in either the District of Columbia or Virginia, nor is there any evi-

dence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested minimum prices.

Parke, Davis learned of the price cutting through its salesmen who called at those retail stores which ordered directly from Parke, Davis; the salesmen reporting the cut prices and advertising thereof, due to the complaints of such retailers.

[fol. 41] 11. In the spring of 1956, Parke, Davis also had a policy of refusing to sell to retailers it deemed to be undesirable customers, including those whose failure to maintain suggested minimum retail prices disrupted the market, and of refusing to sell to wholesalers who sold to retailers who were considered undesirable.

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit. This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws. At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company. Upon the basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia, and upon his return he instructed his assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer. Parke, Davis did not seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences. These instructions were carried out in July, 1956.

[fol. 42] 13. When five retailers continued, despite the announcement of Parke, Davis' intentions, to sell Parke, Davis products below the suggested minimum retail prices, Parke, Davis discontinued selling to them and told wholesalers in the District of Columbia and Virginia that it would discontinue selling to them also if they sold Parke, Davis products to those retailers.

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices. Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves, although occasionally such products were sold by inadvertence to those retailers. There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject.

15. The retailers who were cut off by Parke, Davis because they failed to observe Parke, Davis' suggested minimum retail prices continued nonetheless to advertise such products at cut prices by window displays or newspaper advertisements for the reason that they still had such products in their inventory.

16. Advertising of price cuts by a few retailers in the District of Columbia was, so far as Parke, Davis products were concerned, confined to a few products, mostly certain popular vitamins. In some cases, the prices quoted in the advertisements were below the price at which a small retailer could purchase the same product from Parke, Davis or one of its wholesalers. These advertisements injured the good name and marketability of Parke, Davis' products generally and resulted in Parke, Davis losing the support and confidence of the great majority of the retailers upon whom it relied for the promotion of its goods. The principal cut price advertiser, Dart Drug, encouraged customers [fol. 43] responding to its advertisements to purchase its own private brand of vitamins, and the proprietor of that concern acknowledged that on occasion its salesmen had switched customers requesting Parke, Davis products to such Dart private brands. This was one of the purposes of cut price advertising.

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows. Parke, Davis then resumed selling its products to each of these retailers, and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices. Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers.

18. Although advertisements featuring Parke, Davis products at cut prices commenced to appear again in newspapers in the District of Columbia at the end of September 1956, and although the retailers which had ceased such advertising thereafter resumed it, Parke, Davis took no further action with regard to retail prices or advertising, and it continued to sell to all retailers concerned.

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis products and Parke, Davis continued to sell to Peoples. Parke, Davis did not solicit any agreement, and Peoples did not [fol. 44] enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.

20. No witness was called connected with Babbitt. There is no evidence that Parke, Davis solicited any agreement, or that Babbitt entered into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. However, sales to Babbitt were curtailed for a period of time and later resumed.

21. Standard Drug was advised of Parke, Davis' policy and informed that if it continued to cut prices on Parke, Davis products it would be cut off. It made no commitment of any kind to Parke, Davis, it continued to cut prices, and

it was cut off for about two weeks. Parke, Davis did not solicit any agreement, and Standard Drug did not enter into any agreement or understanding of any kind with Parke, Davis concerning either prices or advertising.

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in co-operative advertising and purchasing. From time to time, Drug Mart advertised cut prices on Parke, Davis products. Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued, and Drug Mart in fact discontinued such advertising for a period of several months. There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount. Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. The evidence shows [fol. 45] that each member store of the organization was free to charge whatever prices it wished and to advertise as it wished, regardless of whether there was any joint advertising of Parke, Davis products.

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it. Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis. When it again advertised Parke, Davis refused to sell. Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter. At all times, Dart Drug sold Parke, Davis' products

at cut prices in its store, whether or not it was advertising them. Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them.

24. State Drug and McReynolds Drug were among the retailers who were cut off by Parke, Davis when they continued to sell Parke, Davis products at cut prices after Parke, Davis' policy had been announced to them. Neither concern individually advertised cut prices in the newspapers, though they did through Drug Mart, an association of independent retailers. While neither one was alleged to have conspired individually with Parke, Davis as to pricing, advertising or any other matter, the Drug Mart group, of which State and McReynolds were members, was alleged to have conspired with Parke, Davis as to pricing and advertising.

[fol. 46] 25. No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis & Company products.

26. On December 12, 1957, subsequent to the trial of the companion criminal action, Parke, Davis informed Dart Drug Company that it was permanently closing the Dart account and did not intend to have any further dealings with that company. Since that time, Parke, Davis has not sold its products to Dart Drug. There is no evidence, however, that Parke, Davis made any effort to influence the dealings of Dart Drug with the wholesalers, and Dart Drug has continued to purchase Parke, Davis' products from wholesalers in the District of Columbia and to sell and advertise such products at cut prices. Parke, Davis' action in ceasing relations with Dart was a purely unilateral one, and there is no evidence that it had any relation to Dart's prices or advertising policies.

27. In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell. Since the fall of 1956, and up until the present time, retailers in both areas, including retailers alleged to be co-conspirators, have continuously

sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and or Parke, Davis itself. Parke, Davis has made no efforts to compel the cessation of these practices. There is no proof or indication of any intention on the part of Parke, Davis to resume such efforts. There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. [fol. 47] Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia.

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis. The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.

29. The evidence shows that in early 1956 Washington Wholesale Drug Exchange, a co-operative, adjusted its practices in billing its customers on Parke, Davis goods so as not to credit any of its accounts with a cash discount on the face of the invoice, when Parke, Davis pointed out that it was crediting for a cash discount without proof that cash had in fact been paid. Its billing practices were inconsistent with the suggested minimum resale price policy of Parke, Davis, which took no action to prevent the granting of cash discounts whenever they had in fact been earned. Under the modified billing procedures, cash discounts were still granted in a different form. The evidence

shows that in making this change in its billing practices, Washington Wholesale was merely conforming to Parke, Davis' minimum resale price policy, and did not make any agreement as to price.

[fol. 48] 30. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to sell pharmaceutical products only to retailers licensed to fill or dispense prescriptions. The evidence shows that the wholesalers were familiar with Parke, Davis' policy in this respect as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 refused to sell Parke, Davis' products to non-drug outlets because they each separately recognized that if they did not adhere to this policy, Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to sales to non-drug outlets, or that Parke, Davis ever solicited an agreement from any of them as to this matter.

31. There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more than one wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer.

Conclusions of Law

1. The evidence as a whole does not support the allegations of paragraphs 13 through 16 of the Complaint.

2. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that on sales of pharmaceutical products manufactured by defendant Parke, Davis the wholesaler co-conspirators and retailer co-conspirators would adhere to resale prices fixed by defendant Parke, Davis.

[fol. 49] 3. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone

else involving the District of Columbia or the State of Virginia to the effect that the defendant and the wholesaler co-conspirators would refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who did not agree to adhere to resale prices fixed by defendant Parke, Davis.

4. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the retailer co-conspirators would not advertise pharmaceutical products manufactured by defendant Parke, Davis at prices lower than the resale prices fixed by defendant Parke, Davis.

5. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant and the wholesaler co-conspirators would refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who advertised such products at prices lower than the resale prices fixed by defendant Parke, Davis.

6. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant would induce, coerce and compel wholesalers not to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who sold or advertised such products at prices lower than the resale prices fixed by defendant Parke, Davis.

[fol. 50] 7. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that defendant Parke, Davis and the wholesaler co-conspirators would sell pharmaceutical products manufactured by defendant Parke, Davis only to retailers licensed to fill or dispense prescriptions.

8. No violation of Section 1 of the Sherman Act has been shown.

9. No violation of Section 3 of the Sherman Act has been shown.

10. In view of defendant's changed practices and the other facts found by this Court in connection therewith, the awarding of injunctive relief would be neither necessary nor appropriate, even had the defendant, contrary to this Court's findings, been found to have engaged in unlawful price activities.

11. Plaintiff has shown no right to relief upon the facts and law, and defendants's timely motion for dismissal under Rule 41(b) is granted, and judgment in favor of the defendant shall be entered in accordance with these findings of fact and conclusions of law.

Joseph R. Jackson, United States District Judge by designation.*

July 16, 1958

[fol. 51] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064-57

UNITED STATES OF AMERICA, Plaintiff,

v.

PARKE, DAVIS & COMPANY, Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES - Filed September 11, 1958

I

Notice is hereby given that the United States of America, plaintiff in the above entitled action, hereby appeals to the Supreme Court of the United States from the final order of the district court entered on July 16, 1958 dismissing the complaint.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C.

* A Senior Judge of the United States Court of Customs and Patent Appeals, sitting by designation pursuant to the provisions of 294(d) of Title 28, United States Code.

29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

II

The Clerk will please prepare a transcript of the record in the above entitled action for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the entire record in this case.

III

The Government's evidence in a Sherman Act civil suit charging a manufacturer with illegal resale price maintenance showed that, in areas which have no "fair trade" laws, the manufacturer had (1) refused to sell directly to retailers who failed to observe the manufacturer's minimum resale prices and or advertised discount prices on such products, (2) induced and compelled, and obtained agreement from, its wholesale distributors to stop selling [fol. 52] to such price-cutting and discount-advertising retailers, and (3) resumed selling to the retailers after they had ceased price cutting or discount advertising or in some instances had agreed to stop advertising discount prices. The evidence further showed that the defendant had terminated these practices prior to trial, after the Government had instituted its Sherman Act investigation and in part as a result thereof. The following questions are presented:

1. Whether the district court erred in holding that these practices constituted merely unilateral action by the manufacturer in selecting its customers, which is permissible under *United States* v. *Colgate & Company*, 250 U.S. 300, and not a price fixing conspiracy between the manufacturer and the retailers and wholesalers.

2. Whether the district court further erred in holding, as an alternative ground for dismissing the complaint, that no relief was necessary because there was "no reasonable probability" that the defendant would resume its attempts to maintain resale prices.

Daniel M. Friedman, Edward R. Kenney, Herbert F. Peters, Marshall C. Gardner, Attorneys, Department of Justice.

[fol. 53] Proof of Service (Omitted in Printing)

[fol. 54] In the United States District Court for the District of Columbia

Civil Action No. 1064-57

United States of America, Plaintiff,

v.

Parke, Davis and Company, Defendant

Order Extending Time for Docketing Appeal—October 30, 1958

Good cause having been shown, it is hereby ordered, pursuant to Rule (13) of the Revised Rules of the Supreme Court, that the time for docketing the appeal in the Supreme Court of the United States be and hereby is extended from November 10, 1958, to and including December 10, 1958.

(S.) Joseph R. Jackson, United States District Judge.

Dated: October 30, 1958.

[fol. 55] Supreme Court of the United States, October Term, 1958

No. 567

Order Noting Probable Jurisdiction—February 24, 1959

Appeal from the United State District Court for the District of Columbia.

The statement of jurisdiction in this case having been substituted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

February 24, 1959.

(Here follows 1 photolithograph, side folio 56)

CIVIL DOCKET

United States District Court for the District of Columbia

vs. C. A. No. Supplemental Page No.

Date		Proceedings	Fees	Total
1958				
June	24	Trial Brief of deft. and memorandum	filed	
June	26	Pltff's request for finding of fact	filed	
June	27	Objections of pltff. to deft's proposed Findings of Fact	filed	
July	16	Memorandum opinion, findings of fact and conclusions of law in re finding for deft. (N) Jackson, J		
July	16	Order entering judgment for deft. & dismissing complaint in accordance with opinion, Findings of fact and conslusions of law filed herewith (N) Jackson, J.		
July	18	Motion of pltff to amend findings of Fact & Conclusions of Law c/m 7-18-58	filed	
July	22	Motion by pltff. for amendment of findings of fact & conclusions of law denied (fist) (N) Jackson, J.		
July	25	Deposition of Herbert Taft, March 18, 1958 ($33.00 paid by deft.)	filed	
July	25	Transcript of proceedings in connection with furthur deposition deposition of Herbert Taft, April 30, 1958 ($15.00 paid by deft)	filed	
Sept	11	Notice of appeal by pltff. to the Supreme Court, Designation of record, c/m 9-11-58	filed	
Sept	11	Plaintiff's exhibits 1-23 inclusive	filed	
Oct.	16	Transcript of proceedings, June 11, 1958 pp 1-158; June 12, 1958 pp 159-265; June 13, 1958 pp 266 - 411 & June 17, 1958 pp 412-449. (Thomas O'Neal, Reporter) Courts Copy	filed	

[fols.1-2] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064-57

UNITED STATES OF AMERICA

v.

PARKE, DAVIS AND COMPANY

Transcript of Proceedings of June 11, 1958

For trial before Judge Joseph R. Jackson at 10 a. m. today.

APPEARANCES:

For the United States: Mr. Edward R. Kenney, Mr. Herbert F. Peters, Mr. Marshall C. Gardner.

For the defendant: Mr. Gerhard A. Gesell, Mr. David B. Isbell.

[fol. 3] PROCEEDINGS

The Deputy Clerk: The United States versus Parke Davis and Company.

The Court: Civil Action 1064-57. Are the parties ready?

Mr. Kenney: The Government is ready, Your Honor.

The Court: You may proceed.

Mr. Kenney: Your Honor, I don't think that I took the occasion Monday when we had the motion before you to introduce my colleagues who will assist me in the trial of this case. This is Mr. Gardner, and Mr. Peters.

The Court: Mr. Gardner; Mr. Peters.

OPENING STATEMENT IN BEHALF OF THE UNITED STATES

Mr. Kenney: May it please the Court, the Government has submitted to Your Honor a rather comprehensive trial brief which states pretty fully our position on the law in this case as applied to the facts which we think will be adduced. I do think it appropriate though, sir, to make a brief statement at this time covering the evidence which the Government expects to be produced through its witnesses in this trial.

As Your Honor knows, Parke Davis, the defendant here, is one of the larger pharmaceutical manufacturers of this

[fol. 4] country. Parke Davis has a so-called retail and wholesale distribution policy. As to the retail policy, Parke Davis enforces its prices in fair-trade areas. Your Honor will know, of course, that the District of Columbia is not a fair trade area, nor during the period covered by this complaint was the State of Virginia.

As to its wholesale policy, Parke Davis enunciates that it will sell only to wholesalers who observe the Parke Davis suggested resale prices, and also to wholesalers who sell only to so-called RX outlets, which means drugstores with registered pharmacists.

Now strangely enough, Your Honor, and one of the features of this case which the Government intends to emphasize, Parke Davis acts not only as a manufacturer but also as a wholesaler. It competes with its wholesalers in this sense. It sells direct to the retailers, but at the same time it exercises very great control over the prices which its wholesalers may charge these retailers. So we expect the evidence to show a horizontal picture there.

Now until the summer of 1956 Parke Davis had never attempted in the District of Columbia to enforce at the retail level its so-called suggested minimum resale prices. Its catalog which contains this policy simply states that [fol. 5] these prices shall be observed in fair-trade areas and are suggested as prices to be observed in non-fair trade areas.

In 1955, the evidence will show, at least one large retailer in this city started selling Parke Davis and other pharmaceutical products at rather deep discount prices. Nothing was done about this until the summer of 1956, and at this time Parke Davis sent its representatives to these retailers who were so called price-cutters in this area, and in Richmond, Virginia, and said to them, "You will either observe our suggested minimum resale prices, and stop advertising these prices at cut rates, or we will stop selling direct to you."

In the Government's case each of the retailers with whom it is concerned and whom we will put on the stand buy direct from Parke Davis, or did at this time.

The representatives went beyond this position, and they said to these retailers, "If you don't go along with us and cooperate and agree with us to do these things, we will go

a step beyond that. We will approach the wholesalers, the only other source of supply which you have here, and we will tell them that they cannot sell to you, so that your entire source of supply of Parke Davis products will be cut off."

Now there was a good bit of dickering back and forth. But in the long run most of the retailers would not agree [fol. 6] to go along with this suggestion. As a result, the evidence will show, Parke Davis did cut them off, and Parke Davis did go to the wholesalers and got the cooperation and the agreement of these wholesalers, who were their competitors, that they would not sell to these pricecutting retailers, thus setting up a boycott.

This went on for some time, and the Department of Justice intervened.

After a period of about six weeks, when most of these retailers could not obtain the Parke Davis product at all, and after the Government started its investigation, representatives of Parke Davis came to these people and they said, "Look, we are interested in having a minimum resale price situation here in Washington. We do want to do business with you. So if you will stop advertising at these cut prices, we will again start to sell you."

All of the retailers in question agreed to do this, and Parke Davis did sell them again, and so did the wholesalers.

This went on for a period of a couple of months, and there were no advertisements in the Washington papers at all during this period on Parke Davis products at cut prices. Then one of the retailers did advertise one, and the situa [fol. 7] tion broke wide open.

The Court: In the papers?

Mr. Kenney: Yes, sir.

But the Government was thoroughly involved in the case at this time, and the defendant did nothing. It kept selling these retailers.

Now last fall a companion criminal case to this was tried and a verdict of acquittal was directed at the close of the Government's case as to all defendants. After the conclusion of that case, the defendant Parke Davis wrote a letter to the Government's principal witness, Herbert Haft, and said that they did not in the future wish to do business

with him at all. So he is still cut off from direct buying, although he can buy from the wholesalers.

That is pretty much the Government's case, Your Honor. I think the facts will prove it in the way that I have stated it, beyond question.

The Court: Do you wish to make a statement at this time, Mr. Gesell?

Mr. Gesell: If I may, Your Honor.

Opening Statement in Behalf of the Defendant

Mr. Gesell: We of course don't look at this case in the same light that Mr Kenney does, and Your Honor is going [fol. 8] to have to judge the facts in the light of the witnesses. To us the case has very little to it. It is nothing unusual, and it presents no issues of law that we are aware of. It is a straightforward issue of fact.

I would like simply to sketch the background to Your Honor, in the hope that this may help appraise the evidence as it comes in from the witnesses. We have no issue of monopoly here, for example, at all. The proof will show that Parke Davis accounts for less than five per cent of the sales in this area, the two areas involved, the District of Columbia and Richmond, Virginia.

As Your Honor knows, there is no charge of collusion with other manufacturers, a substantial number of manufacturers. Prices are conceded by the Government to be competitive, and the market itself is highly competitive in all of these products. I think this case involves some six or seven hundred Parke Davis products; and there are hundreds of other products, comparable products, sold by competing manufacturers.

What is concerned is Parke Davis' unsuccessful efforts in a period of five months in 1956 to carry out some policies that it has had in effect since the last century throughout the country, policies which it has applied uniformly through [fol. 9] out the land in fair trade states and non fair trade states. And those efforts of Parke Davis here, which fell apart and came to nothing, will all concern five months, starting about June or the early part of July, 1956.

And out of the hundreds of customers that we have here in the District of Columbia, we sell to every registered pharmacy in the District of Columbia, and every registered

pharmacy in Richmond, where there are also hundreds—we are concerned with our dealings with five registered pharmacists and with five wholesalers.

Now to understand Parke Davis' policies, it is necessary to know a little about its business. It is a very old company. It prides itself on being what is called an ethical drug manufacturer. And going back way into the last century, it has developed its business in a very singleminded way. It has decided to cater to doctors, to the hospitals, and the pharmacies. And it has emphasized the quality of its goods and the integrity of its products. And it has built up over a long period of time its relations with physicians and with other technical people. All of its salesmen are technically trained — biology, pathology or medicine.

You will never have seen, Your Honor, an advertisement of a Parke Davis product. You will never have seen any [fol. 10] thing like Revlon's advertising, or many other kinds we know, with soft questions and tub thumping about a product name or a brand. It has advertised institutionally to this particular group which it wants to develop and promote its products—the doctors and the hospitals and the pharmacists.

It relies upon the pharmacist to push its goods. It believes that the pharmacist should have the deepest margin of profit and an incentive so that he will promote the goods, so that he will put it on his counter, that he will talk it up to his customers, that he will speak well of it to the doctors who come to him for prescriptions.

To do that it suggests a minimum resale price to all of its pharmacists. That minimum resale price is designed to give to everyone at least a 33⅓ per cent markup on the product. And it hopes by suggesting that price that these pharmacies will become interested in the product and push it. And it is very important that it get the cooperation of the pharmacists, because it isn't depending upon pumping in a mass of advertising, from television and other things, to push people into buying the products. It wants to make them what they are—ethical drugs used by specialists.

Now to the same end—and this is another aspect of the [fol. 11] case on which Mr. Kenney made no reference—it has not been willing to sell its products to what are called non drug outlets. It has not permitted its customers, and

it itself has not sold, to hardware stores, grocery stores, door-to-door salesmen, restrooms, gasoline restrooms, and so forth, because it has kept its line in the hands of the pharmacists. The great bulk of its products are RX products that can only be written by prescription. The state laws in many states prohibit the sale of some of its other products. Here in the District of Columbia there is a big controversy going on now with respect to the sale of aspirin in grocery stores. It has promoted this single channel of trade, which is not a narrow one, but covers every drugstore that has a pharmacy—and that is hundreds, corner to corner, throughout the city.

Now what happened here was this. It had been selling goods in the District of Columbia for some time. There was price-cutting on its goods from time to time. A particular man would run a sale and cut its goods, or put some displays in his windows.

But starting about the period that we are concerned with, several stores began to advertise in the Washington Post and the Times Herald cut prices on certain Parke Davis products, almost entirely vitamins—almost entirely, I be [fol. 12] lieve—very deep price cuts, very flagrant price cuts, and to promote a cut-price business, to bring people into their store. Now this was contrary to Parke Davis' established policy, that it would not sell to retailers or wholesalers who did not observe the minimum resale price.

Now what we say happened is simply this, that to protect the good name of our product, to maintain the support of the pharmacies which have been promoting the product, to maintain our customers' good will, we went to these retailers and said, "We will not sell you if you do not maintain our minimum retail price." And where these retailers refused—and all of them involved in this case refused—they are alleged to have made a price agreement with us, but on the contrary they all refused and they all went ahead, as Mr. Kenney acknowledges in his opening, charging cut prices—we cut them off, and they got their goods elsewhere.

We also went to the wholesalers, and we said to the wholesalers, "We will not sell you and we instruct you not to sell, if you want to continue to do business with us, to any retailer who is cutting prices." And we named these retailers to them. It came as no surprise, because they had

been reading the papers and they know who were cutting prices. And we said, "We will not sell to you if you sell [fol. 13] to them."

There will be an issue of fact, I guess, as to what the wholesalers did. It looks to me as though they told us, "All right, we won't," and then they went ahead and as best they could sold a little to keep the retailers happy. But there isn't any question that sales diminished from the wholesalers to the pricecutting retailers, and I guess in some instances were cut off.

Now that went on, and what happened? The retailers continued to cut prices. The retailers continued to advertise cut prices. The retailers continued to have goods. And it was perfectly apparent that we were unable to achieve anything with respect to stabilizing our price situation. So we went to these retailers and said: "Look, we will sell to you if you will cease advertising your cut prices and take your signs out of your windows advertising cut prices. You can charge any price you want. You can continue to cut prices. If your own trade in this area comes in and you want to sell them at cut prices, that is fine. But we will not sell to you if you advertise price cuts."

The retailers indicated that they were willing to go along on that basis. We sold to them again, these retailers that had been cut off. It is a dispute as to how long, whether it is two weeks or two months. But the most that is claimed [fol. 14] is two months. This lack of advertising by some of these retailers continued, not in Richmond but here in the District of Columbia. And then somebody broke out with an ad. And all of these retailers had said, "Well, of course, if somebody else advertises, I am going to advertise again." And as soon as the ad appeared that was the end of the situation, and they went back to advertising. And they have been advertising and we have been selling them ever since, all through the rest of 1956, all through 1957, and down to the present time.

The Court: In spite of their advertising?

Mr. Gesell: Yes. And they are advertising. And we have given up. We have found it impossible by the exercise of our Colgate's rights to accomplish what we want. What this involves was a squabble with five customers, where we got the short end of the stick and we weren't able to achieve

what we thought we could achieve. And that's all there is to it.

The Court: Do you still refuse to sell to them?

Mr. Gesell: No, we do not. We sell to them, except as to Mr. Haft. I want to come to him. Mr. Kenney mentioned him. But we are selling to all wholesalers, and we are selling to everyone else, and we are selling to wholesalers [fol. 15] who sell to pricecutters.

The Court: You are selling to retailers, too, direct?

Mr. Gesell: We are selling to retailers direct, except Mr. Haft. We have refused to do business with Mr. Haft. Mr. Kenney has filed papers in this case in which he says that was in retaliation for Mr. Haft's testimony in this case. We have filed papers in which we have stated what the reasons are for our refusal to sell. We don't choose to do business with him. We think he is a dishonorable, conniving man, and we don't want to have anything to do with him. And it has nothing to do with price. It has nothing to do with anything but our desire to be free and clear of him. And when the time comes we will give you chapter and verse on that. He still has Parke Davis products. He still buys them from our wholesalers and from others. And he advertises them four times a week, as regularly as clockwork, and has for many months, at cut prices. But we just don't choose to do business with him.

The Court: Wholesalers do, though?

Mr. Gesell: They do. That is right.

The Court: You have no quarrel with that?

Mr. Gesell: We have not told them they may not, and [fol. 16] they are continuing to do it.

We have found that in this non fair trade area it has been impossible, by the exercise of our selection of customers, to accomplish that price stability that we wanted to have. And this market is chaotic. Of course the business of many of our customers has gone way down. Our own business has gone way down. But short of doing what the Government claims we did and what we didn't do, we see no solution but to have to sell. And that situation has prevailed, well, at least 18 months.

Now what I think Your Honor will find when he looks at all of this evidence is that you will find considerable confusion about some of the facts. Witnesses will be unclear

about dates. They will be unclear about who it was that talked to them from Parke Davis. They will be uncertain as to just exactly what was said—and understandably so. These events took place some time back.

And yet what we are concerned with is a pretty precise issue of fact. Because if we said to these people, as we contend we did, and as Judge Tamm found on the evidence we did, that we just simply exercised our unilateral rights to refuse to sell, why then it is, I gather, conceded by the [fol. 17] Government itself that there is no violation here. And certainly the cases we have cited to Your Honor make that clear.

On the other hand, if we went out and actively solicited agreements, understandings, supported by all kinds of cooperative action with the other retailers, and with an espionage system and all the other paraphernalia of some of these cases, then we are over into the agreement area. And if it concerns price, we are in difficulty.

When Your Honor listens to this evidence, you are going to have to determine what it was the salesmen were instructed to do by the company, and what it was they really said, and what was the purport of what they were doing. And it is going to take all of us, I think, some time, with some of these witnesses, to try to pin down precisely what it was, if they now recall it—and I would guess if they were truthful, most of them don't—was said. And then we are going to have to see whether these agents were acting in accordance with company instructions, or whether they were in some frolic of their own.

The Court: Will the same witnesses appear here as appeared before Judge Tamm in the criminal action?

Mr. Gesell: As I understand it, there will be, on the Gov[fol. 18] ernment's side, mostly the same, but some additional witnesses. Of course we put on no proof.

The Court: I understand.

Mr. Gesell: Now if we get over to this advertising area, get away from the question of price fixing, price agreement, then we have got an additional fact to determine. If Your Honor decides that there was an agreement with these five retailers, let us say, for a period of six weeks or two weeks or two months or whatever it was, that they would not advertise cut prices, we still have to determine whether or

not the Government has demonstrated on the evidence that that agreement was unreasonable, that it unduly restricted trade.

We will have proof on our side of the case that the advertising of these people was for improper motives, and we will have proof as to its disruptive effect on our own trade.

Your Honor will have in mind that these stores concerned in the discussions of advertising were free to charge any price they wanted to in their store, and did, and this had to do only with their insertion of these what we consider come-on ads in the newspapers for this period.

So as to that area, and if the Government presents proof [fol. 19] on it as to the non drug outlet area, Your Honor will also have to consider whether the Government has met its burden of showing that any arrangement they contend that was made was unduly restrictive of trade and unreasonable under the circumstances of the competitive marketing of this product. And I think when you get all through you are going to say, "Well, what I have here is a squabble between Parke Davis and a handful of its customers, where Parke Davis got the short end of the stick, and I see nothing here of a violation or of a threat of violation that warrants the intervention of a court of equity."

COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Kenney: Your Honor, if this were a jury trial I would have to ask you to caution the jury that Mr. Gesell's statements were not evidence.

The Court: Well, that goes without saying.

Mr. Kenney: I would like, sir, to hand you up at this time the exhibits which the Government will introduce in evidence in this case.

The Court: Have you seen them, Mr. Gesell?

Mr. Kenney: Yes, sir; he has them all.

The Court: You had better check and see.

Mr. Gesell: Well, I don't have a book. If they are the ones in the criminal case, of course I have them.

[fol. 20] Mr. Kenney: They are the same exhibits.

Mr. Gesell: But perhaps you can help me by giving me the order. Have you another book?

Mr. Kenney: I don't have them in a book, no.

Mr. Gesell: We will go ahead, Mr. Kenney, because I have them and I can find them as we go along. I don't want to hold anything up.

The Court: Does this book go in as one exhibit?

Mr. Kenney: No, sir. They will go in as individual exhibits.

Mr. Gesell: With the witnesses, I take it.

Mr. Kenney: With the witnesses, and I hope they are in the order in which they will go in. And we may have to call some of our witnesses out of turn.

The Court: They may be taken care of separately.

Mr. Kenney: Yes, sir.

The Court: All right.

Mr. Kenney: And in that connection, Your Honor, could I inquire as to the hours which you intend to sit here, because I don't want to keep our witnesses around too long if I can help it.

The Court: We take a morning recess at quarter past 11, and we came back at half past 11 and stay until half past 12. We recess then until quarter to two, and I would like to quit [fol. 21] at four o'clock.

Mr. Kenney: Thank you, sir. That will be fine.

The Court: If that is satisfactory to everybody.

Mr. Kenney: That is satisfactory to me.

Mr. Gesell: It is.

The Court: That is assuming the thing isn't going to drag.

Mr. Kenney: I don't think it will drag, Your Honor.

The Court: Is the rule of exclusion being invoked?

Mr. Kenney: The Government has no interest one way or the other.

Mr. Gesell: We have none, either, Your Honor.

The Court: All right.

Mr. Kenney: Would you call Herbert Haft, please.

[fol. 22] Thereupon HERBERT HAFT, called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

Direct examination

By Mr. Kenney:

Q. Your name is Herbert Haft?
A. Yes, sir.
Q. What is your address, Mr. Haft?
A. 7012 West Greenville Parkway, Chevy Chase, Maryland.
Q. And what is your occupation?
A. Pharmacist.
Q. How long have you been a pharmacist?
A. Since 1941.
Q. And where did you take your degree in pharmacy?
A. George Washington University.
Q. Do you presently own and operate some drugstores?
A. Yes sir; I do.
Q. And what is the name of this store or stores?
A. Dart Drug Corporation. We operate three stores, sir.
Q. Prior to your ownership of Dart Drug, did you own [fol. 23] another drugstore?
A. Yes, sir.
Q. And what was the name of that drugstore?
A. Woodley Drugstore.
Q. And when did you acquire that?
A. In 1957.
Q. And when did you first open your Dart store?
A. In 1955.
Q. Mr. Haft, when you opened Dart Drugstore in 1955, did you operate it as a cut-rate drugstore?
A. Yes, sir.
Q. From the beginning?
A. Yes, sir.
Q. At the time you commenced your operations, did you sell Parke Davis pharmaceutical products?
A. Yes, sir.
Q. From the outset?
A. Yes, sir.
Q. Did Parke Davis furnish you a catalog showing its

prices, that is, the cost to you and the suggested prices at which you should sell?

A. Yes, sir.

Q. Did this catalog also contain a statement of Parke Davis' policy as to its retail prices?

A. Yes, sir.

[fol. 24] Mr. Kenney: Would you please mark this Government Exhibit for identification No. 1.

(Sheet headed "Minimum retail prices applying to Parke-Davis products" was marked for identification as Government Exhibit No. 1.)

By Mr. Kenney:

Q. Mr. Haft, I show you Government Exhibit for identification No. 1 and ask you if you can identify that.

A. Yes, sir; I can.

Q. And would you tell us what it is?

A. It is the minimum retail prices applying to Parke Davis in fair-trade states, and a suggested minimum retail prices in the non-fair-trade states, such as the District of Columbia.

Mr. Kenney: Your Honor, I offer Government Exhibit for identification No. 1 into evidence.

The Court: Is there any objection?

Mr. Gesell: No objection.

The Court: It may be received.

(The sheet heretofore marked for identification as Government Exhibit No. 1 was received in evidence.)

By Mr. Kenney:

Q. Mr. Haft, does this policy as set forth in Government [fol. 25] Exhibit 1 state that you have to observe these suggested retail prices?

A. Yes.

Mr. Gesell: I object to that. The policy speaks for itself, Your Honor.

The Court: Sustained.

By Mr. Kenney:

Q. Mr. Haft, I would like you to read into the record the first two paragraphs of this policy (handing to witness).

A. "The minimum retail prices herein set forth or in price change supplements applying thereto are in conformity with the provisions of the Fair Trade laws of the States having such laws and are suggested for use also in those states which have not enacted Fair Trade laws."

New Paragraph:

"Minimum retail prices applying to consumers shall be 10 per cent less than the published list prices applying on unit stock packages in this catalog and supplements applicable unless otherwise specified. Such prices are exclusive of sales and other excise taxes, which are to be added thereto."

Q. Thank you. Now in your operation, Mr. Haft, of the Dart drugstores in the District of Columbia, did you observe [fol. 26] the suggested minimum resale prices of Parke Davis?

A. No, sir.

Q. Until the summer of 1956, is this the only retail price policy of Parke Davis that you knew of?

A. Yes, sir.

Q. Were you ever told that in addition to this particular policy there was another policy, not in writing?

A. No, sir.

Q. Until 1956?

A. That is right, sir.

Q. Mr. Haft, how does Parke Davis service your account, or how did it service your account, in the summer of 1956?

A. They had a sales representative who would visit the stores, check the stock, give me an inventory on the items he thought I needed. And based on the discussion between the salesmen and myself and the inventory figures, we would place a new order.

Q. Do you recall, for instance, in the month of July, 1956, the name of this salesman?

A. Anthony Tancretti.

Q. Now when Mr. Tancretti would put in an order, would he put that in direct to Parke Davis?

[fol. 27] A. Yes, sir.

Q. In Baltimore?

A. In Baltimore.

Q. Did you buy more direct from Parke Davis than you did from local wholesalers?

A. We bought substantially all from Parke Davis and only infrequently from drug wholesalers.

Q. Was there a reason for this, Mr. Haft?

A. The reason we bought substantially all from Parke Davis was because there was a tremendous price differential between the price that Parke Davis charged and the price that the wholesalers charged. Parke Davis' price was substantially lower.

Q. In its direct sales to you?

A. In its direct sales, yes, sir.

Q. And after you put in the order, the goods would come to your store from Baltimore? Is that right?

A. That is right, sir.

Q. Now, Mr. Haft, I believe you testified you opened your store in 1955.

A. Yes, sir.

Q. Were you advertising Parke Davis products at cut prices at the time you opened your store in 1955?

A. Yes, sir.

Q. You were?

A. Yes, sir.

[fol. 28] Q. I want to direct your attention to the month of July, 1956, and specifically to the 3d day of July, 1956, and ask you if there came a time on that day that you had a discussion with certain Parke Davis representatives.

A. Yes, sir.

Q. And can you tell us the name or names of those Parke Davis representatives?

A. Mr. Richard Cummings, who was their sales manager for this particular area; and Mr. Brooks Brown, who was their hospital representative.

Q. Can you tell us where this conversation took place?

A. At my offices at 18th and Columbia Road, Northwest.

Q. And was anyone else present other than you, Mr. Cummings and Mr. Brown?

A. Yes, sir—Miss Nancy Toohey.

Q. And who was Miss Toohey, please?

A. She was an office manager or bookkeeper.

Q. Is Miss Toohey still with you?

A. No, sir.

Q. Do you know her present whereabouts?

A. No, sir; I do not.

Q. Now can you tell us, Mr. Haft, what was said by Mr. [fol. 29] Cummings or Mr. Brown and you at this meeting?

A. Yes, sir.

Q. Would you please tell the Court, as best you can recall, what was said during this conversation?

A. Mr. Cummings, who was the sales manager, stated that he wanted to talk to me in reference to a new policy that Parke Davis was going to set up. He wanted me to raise my prices, which were at a discount level, to their minimum resale prices as stated in their catalog. He said that if I did not raise my prices from the discount level to the minimum resale, they would no longer ship me merchandise and that they would see that the wholesalers who they dealt with would not ship me any merchandise; and that if the wholesalers did ship me merchandise, they would cut off the wholesalers from buying from Parke Davis.

Q. Mr. Haft, did Mr. Cummings state or indicate to you that you were the only retailer whom he was contacting?

A. No, sir. He stated that he had already that day contacted Drug Mart Stores, who at that time were a group of approximately 30 stores, and that they had indicated—he had told them the same thing; they would be cut off from their source of supply if they didn't bring their prices up— [fol. 30] and they had indicated that they would raise their prices.

Q. Now is this Drug Mart group a group of independent drugstores, you say?

A. Yes, sir; they are a cooperative group of independents, of approximately 30 stores.

Q. What did you tell Mr. Cummings at this time, Mr. Haft?

A. I told Mr. Cummings that I felt that getting together to raise prices as a group violated certain antitrust statutes, to my understanding.

Q. Mr. Haft, while Mr. Cummings was there, did you have occasion to talk to your attorney?

A. Yes, sir; I did.

Q. You did talk to your attorney?

A. Yes, sir.

Q. And after you talked to your attorney, what statement did you make to Mr. Cummings?

A. After I excused myself from one office and went into another office and called my attorney, I made the statement I just made previously, that we felt it was a violation of certain antitrust and Federal statutes, and that unless we could get some written statement of policy from them, we could not consider their proposal. However, if they would put their proposition in writing, we would be glad to give it consideration.

[fol. 31] Q. Did Mr. Cummings tell you where these orders came from?

A. He said they came directly from one of their top officials in Detroit, Michigan, whose name was Mr. Loyne—L-o-y-n-e.

Q. Did he mention Mr. Loyne as the president of Parke Davis?

A. Yes, he did, sir.

Q. When Mr. Cummings talked to you about the Drug Mart stores, did he mention any other stores in this connection?

A. Yes, sir; he did. He said he had already gone to Drug Mart, and that they would go to Peoples Drugstores, to Tate's Drugstores, to Standard Drugstores, to Babbitt's stores, and anyone else that was applicable in this area.

Q. Mr. Haft, at this time and during this meeting did you agree with Mr. Cummings that you would adopt his request?

Mr. Gesell: I object to that, Your Honor. That asks for a conclusion. I think he ought to say what he said.

The Court: Sustained.

By Mr. Kenney:

Q. Would you state if anything further was said during this conversation between you and Mr. Cummings.

[fol. 32] A. I told him that I would refuse to enter into any agreement which my attorneys felt was illegal.

The Court: Agreement with whom?

The Witness: With Parke Davis to raise the prices.

By Mr. Kenney:

Q. After Mr. Cummings left on the 3d of July, Mr. Haft, and immediately thereafter, were you able to buy Parke Davis products direct from the company?

A. No, sir; I was not.

Q. Did you actually put in any orders to Parke Davis?

A. Yes, sir; I did.

Q. And in what form did you put in those orders?

A. In two forms, sir. No. 1, I called their branch offices in Baltimore—Baltimore, Maryland—and called in orders to the officials there, who refused to take them.

Then, No. 2, I sent them registered letters containing orders, which they refused to accept or honor.

Q. Which officials in Baltimore are these that you mention?

A. Mr. Powers and Mr. Dripps.

Q. And do you know what Mr. Dripps' position is with Parke Davis?

[fol. 33] A. Mr. Dripps is the Baltimore branch manager.

Q. And do you know what Mr. Powers' position is?

A. Mr. Powers is the Baltimore assistant branch manager.

Q. Did you have any direct conversations after this period of July 3d with Mr. Powers or Mr. Dripps?

A. Yes, sir; I did.

Q. With which one?

A. With Mr. Powers.

Q. And were these telephone conversations?

A. Yes, sir.

Q. Can you tell us approximately how long after the 3d of July you had your first telephone conversation with Mr. Powers?

A. Within a few days after the 3d of July.

Q. And did you talk to him at that time?

A. Yes, sir; I did.

Q. And what was said by you and Mr. Powers?

A. No. 1, I tried to get him to accept an order, which he refused to do.

No. 2, I tried to get him to put their position into writing, so that we could bring it, we would know exactly what we were talking about. He said there would be no written cor-

respondence about them cutting me off, that I was cut off, period.

[fol. 34] No. 3, I brought to his attention the fact that he was shipping other stores who were still cutting, and that I thought it was unfair, the treatment accorded me because of my cutting, to cut me off, when there were other stores which were cutting to which he still shipped.

Q. Did you mention the names of these other stores?

A. Yes, sir; I did.

Q. And what other stores are you referring to?

A. There were a series, consisting mainly of Peoples Drugstores, which was directly across from the store at 18th and Columbia Road. They were cutting. They had big signs on their windows stating the cut prices on Parke Davis. And yet Parke Davis still shipped them.

Q. Did Mr. Powers have any comment about this situation as it regards Peoples?

A. Yes, he admitted they were still shipping Peoples; but that they were endeavoring to get them to bring their prices up to the minimum resale from the cut-price level, and that in the meantime they would ship them.

Q. Well now sometime after the 3d of July, and the meeting with Mr. Cummings and Mr. Brown, did you have any other conversations with Cummings or Taneretti, your salesman?

A. Yes, sir; I did.

[fol. 35] Q. And approximately how long after the 3d of July would you have had a conversation with Mr. Cummings?

A. With Mr. Cummings and Taneretti was approximately two weeks after the 3d of July, somewhere.

Q. And was this a conversation with both of them at the same time?

A. This was a conversation with both, sir.

Q. And could you tell us what was said during this conversation? And where did it take place, Mr. Haft?

A. This conversation took place at 18th and Columbia Road, at the offices, and also in the store.

Q. What was said during the conversation?

A. No. 1, I asked them whether they would ship me some pharmaceutical items which were of vital necessity and which I was now out of, even if they wouldn't ship me the

vitamin items. And they refused to ship me any antibiotics or any pharmaceutical items. They said that was the policy.

No. 2, I asked them to see if they couldn't possibly bring this out from behind the barn and get me a written letter of Parke Davis policy; and they refused to do that.

Thirdly, I took them personally directly across the street to Peoples Drugstore and showed them where Peoples was [fol. 36] still cutting and had big signs on their window for Parke Davis products, and asked them if this was not unfair and were they still shipping Peoples. And they said yes, but they were under orders.

Q. Now sometime after the 3d of July, Mr. Haft, did you have a further conversation with Mr. Powers on the question of advertising?

A. Yes, sir; I did. Somewheres approximately around the 16th or 17th, somewheres in that vicinity prior to the 19th of July, I was running short of merchandise. I spoke to Mr. Powers. And we had been having a continuing conversation. And he asked me whether I had had enough, I was ready to give up; and I said, "Well, I need merchandise. What do I have to do in order to get it?"

He said, "If you will discontinue advertising and take your signs off the window," which referred to Parke Davis, "and take the little showcards which are in the window on the actual merchandise, we will resume shipping you."

And I agreed to stop the advertising and take the signs off.

Q. At that time?

A. At that time, yes, sir.

Q. Did Mr. Powers mention any other drugstores who [fol. 37] were advertising at this time?

A. He said that he had had, that all the rest of the stores were already in line, that is, Drug Mart, Peoples, Babbitt, and Standard; that I was the last one; that now I was in line that he would give me his word that now that I stopped advertising, everyone else would stop advertising.

Q. After this conversation, did you submit orders to Parke Davis direct?

A. Yes, sir; I did.

Q. And were these orders filled?

A. Yes, sir; they were.

Q. Were they filled in their entirety?

A. No; they were partially filled. I would order a hundred or two hundred of an item, and they would just fill small quantities of it.

The Court: Such as what number? What do you call "small" quantities?

The Witness: A dozen or two. Where I would order a couple of hundred, I would get maybe 20 pieces or so.

By Mr. Kenney:

Q. Mr. Haft, how long did this agreement not to advertise last?

Mr. Gesell: I object to that. There is no proof about an [fol. 38] agreement not to advertise.

The Court: I will sustain your objection.

Mr. Kenney: Your Honor, I understood the witness to say that he had agreed that he would not advertise.

The Court: Agreed with whom?

Mr. Kenney: With Mr. Powers of Parke Davis.

The Court: Well, your question didn't imply that to me. Reframe it.

By Mr. Kenney:

Q. How long did you discontinue advertising Parke Davis products?

A. I discontinued from July the 19th to August the 2d.

Q. And after the 2d of August, did you again start advertising Parke Davis products?

A. Yes, sir; I did.

Q. What was the reason you started advertising again?

A. On July the 27th Drug Mart Stores came out with an advertisement of Parke Davis products at cut prices. And Mr. Powers, when I made the agreement with him, told me that no one else would advertise at cut prices. So this broke the agreement. And the next ad I could get in from July 27th was August the 2d. And I called Mr. Powers and said, [fol. 39] "You have not kept your commitments, and I am putting you on notice that I will resume advertising at cut prices."

Q. After this latest conversation with Mr. Powers, were you able to get any Parke Davis products direct from that company?

A. As soon as I put them on notice, on approximately July the 27th, that I was going to resume advertising, they cut off my shipments of Parke Davis products.

Q. Did there come a time when your supply of Parke Davis products was running low?

A. Yes, sir; it did.

Q. Did you attempt to obtain some from other sources?

A. Yes, sir; I did.

Q. Did you attempt to obtain some from out-of-town sources?

A. Yes, sir; I did.

Q. Where did you go, Mr. Haft?

A. I went to Philadelphia and New York, sir.

Q. Were you able to obtain any Parke Davis products in Philadelphia and New York?

A. No, sir; I was not.

Q. Now during this time that you were cut off, did you have any conversation either personally or on the telephone [fol. 40] with Mr. Dripps?

A. Yes, sir; I did.

Q. And can you tell us approximately when your first conversation with Mr. Dripps took place?

A. That would be the early part of August, sir.

Q. And can you tell us what you said to Mr. Dripps and what he said to you during this first telephone conversation?

Mr. Gesell: He didn't say he had any telephone conversation.

Mr. Kenney: Yes, he did. I asked him if it were a telephone conversation.

By Mr. Kenney:

Q. It was a telephone conversation?

A. It was a telephone conversation, yes, sir.

Q. And can you tell us what was said?

A. Yes, sir. We had a discussion about shipments which had been cut off at this time, and he said they would not ship. We had a discussion in reference to shipment of prescription pharmaceutical items only, which he refused to ship.

We had a discussion in reference to putting their refusal to ship or policy in writing, which he refused to do.

Then I asked him further, "Well, what, or where do we go from here?"

[fol. 41] And he said, "Well, my recommendation to you is to call Mr. G. L. Walker."

Q. Did he say who Mr. G. L. Walker was?

A. He said he was the general sales manager of Parke Davis, and he was located in Detroit, Michigan.

Q. Did you call Mr. Walker?

A. Yes, sir; I did.

Q. And did you call him on the telephone?

A. I called him on the telephone, sir.

Q. And approximately when would this have been?

A. This was the beginning of August, immediately, at the same time, right after I had spoken to Mr. Dripps in Baltimore.

Q. And will you tell us now what was said during your conversation with Mr. Walker?

A. I put the call in person to person, and was answered by a secretary or some girl in the office. And she said, "Mr. Walker's office. Who is calling?" And I identified myself.

Mr. Walker got on the phone, and before I could actually state the purpose of my call, he started a conversation. He seemed to be aware of exactly what I had called about.

He, No. 1, said that he would refuse to ship me. We had a discussion and he refused to ship. I asked him if he would [fol. 42] ship pharmaceutical items only, which were necessary to public health, and he refused to ship those.

He said he refused to put their policy in writing, so that we could bring it to the forefront and have a basis of discussion.

He asked me if I had had enough and if I was ready to agree to their terms. He said that he had brought bigger fellows than me to their knees. And he mentioned specifically Cunningham Drugstores, who I understand are a chain in the middle west, and Sam's Cutrate, who I understand are in the Detroit area.

Q. Did you say anything to Mr. Walker during this conversation, or did he do all the talking?

A. He did the majority of the talking. I put my request in, that is, for shipments, and for some type of written correspondence, which he refused to do.

He also stated to me that he was going to clean this situation up in Washington, and if necessary he would refuse to ship any Parke Davis merchandise into the entire Virginia, Maryland and District of Columbia areas, that is, the Washington metropolitan area; and that I would see that in time they would get the prices up to minimum resale.

[fol. 43] Q. Mr. Haft, you testified earlier that you sometimes bought from local wholesalers.

A. Yes, sir.

Q. Now during this period of 1956 which we are talking about, which local wholesalers were you dealing with?

A. I dealt with two out of three. I dealt with the District Wholesale Drug Corporation, and the Henry B. Gilpin Company. I did not deal with the third local wholesaler, who is the Washington Wholesale Drug Exchange.

Q. At this time?

A. That is right, sir.

Q. Now did you put in any orders to the District Wholesale Drug Company, calling for Parke Davis products?

A. Yes, sir; I put in daily orders.

Q. Were these orders ever filled?

A. No, sir; they were not.

Q. Did you discuss this with anyone in the District Wholesale Company?

A. Yes, sir; I did.

Q. And with whom did you discuss this matter?

A. Mr. Dave Estrin.

Q. And what is Mr. Estrin's position with District Wholesale?

[fol. 44] A. He is president of District Wholesale Drug Corporation.

Q. Can you tell us when you had a discussion with Mr. Estrin?

A. It would be the end of July, the last few days of July or the beginning of August.

Q. And was this a telephone conversation or a person-to-person conversation?

A. This was a telephone conversation, sir.

Q. Did you call Mr. Estrin, or did he call you?

A. I called him, and he was not available. And he returned my call, sir.

Q. And what did he say to you during this telephone conversation?

Mr. Gesell: Objection, Your Honor. I don't see what Mr. Estrin said to Mr. Haft——

The Court: It is hearsay. Sustained.

Mr. Kenney: Your Honor, this is something that comes up in all of these antitrust cases, and I submitted to Your Honor a brief on this question. This man Estrin is a co-conspirator. His declarations in furtherance of the conspiracy are admissible.

The Court: All right. I will change my ruling, then.

By Mr. Kenney:

[fol. 45] Q. What did Mr. Estrin say to you?

The Court: I didn't know that he was a co-conspirator.

Mr. Kenney: Yes, sir; he is a co-conspirator.

Mr. Gesell: He is what?

Mr. Kenney: He is a co-conspirator, Your Honor. The District Wholesale Drug Company is a co-conspirator, named as one in the complaint, and he is president of it.

The Court: What do you say to that, Mr. Gesell?

Mr. Gesell: Well I would say on the record now he certainly is no co-conspirator. And there certainly isn't any proof that Mr. Estrin or the District Wholesale is in any agreement or understanding or anything with Parke Davis.

So that if Your Honor is going to permit this testimony to come in, it certainly would have to be subject to a motion to strike upon a failure to establish any conspiracy with Mr. Estrin.

The Court: It is.

Mr. Kenney: Yes, sir.

Mr. Gesell: And I should have a continuing objection with respect to this type of testimony.

The Court: You may have. And if the conspiracy isn't [fol. 46] proven, of course it will be all stricken.

Mr. Gesell: But this testimony, any statement of Mr. Estrin, certainly cannot be used to prove any conspiracy.

The Court: Is this supposed to be a statement that would bind other conspirators?

Mr. Kenney: Yes. Your Honor——

Mr. Gesell: I take it it is offered against us.

Mr. Kenney: May I make this statement? And Mr. Gesell knows this as well as I do. Antitrust cases have long been recognized by the courts as being a little different type of conspiracy case than the ordinary case, because it is hard to pin down exactly when the conspiracy took place.

Now this evidence obviously is admissible, subject of course to a motion to strike. If the Government doesn't prove it's conspiracy to Your Honor's satisfaction, it will all be stricken.

The Court: That is right.

Mr. Kenney: But if we prove a conspiracy, this statement of Mr. Estrin can be used against Parke Davis.

The Court: That is true.

[fol. 47] Subject to motion to strike, I will reverse my ruling in sustaining your objection.

By Mr. Kenney:

Q. Now what did Mr. Estrin say to you and what did you say to him during this telephone conversation?

A. I asked Mr. Estrin why he was not shipping me Parke Davis items, which we both knew he had in stock. He admitted he had them in stock, but that he was under orders from Parke Davis, who sold to him, not to ship to a group of drugstores, which he referred to as a blacklist.

Q. And was your store on that list?

A. My store was on the list.

Q. Did he mention any other drugstores who were on this blacklist?

A. Yes, sir; he did.

Q. And could you now recall the names of some of those drugstores?

A. Yes, sir. He said the blacklist consisted of——

The Court: Did he use that expression, "blacklist"?

The Witness: Yes, sir; he did.

The Court: All right.

The Witness: McReynolds Pharmacy, State Drugstore, [fol. 48] Standard Drugstores, myself, and the Drug Mart Stores in their entirety.

By Mr. Kenney:

Q. That is your recollection?

A. That was the conversation.

Q. Now did you attempt to obtain any supplies of Parke Davis pharmaceutical products from the Henry B. Gilpin Wholesale Company?

A. Yes, sir; I did.

Q. And were you successful in obtaining them?

A. No, sir; I was not.

Q. Did you put in orders, actual orders, for Parke Davis products to Henry B. Gilpin?

A. I put in daily orders to the Henry B. Gilpin Company.

Q. Were these put in on the telephone or through a salesman?

A. They were put in both on the telephone and also through a salesman.

Q. And who was the Henry B. Gilpin salesman that you dealt with during this period?

A. Mr. James Carr.

Q. Did you have any conversations with Mr. Carr about the orders which you were putting in with him for Parke Davis products?

[fol. 49] A. Yes, sir; I did.

Q. And would these conversations or this conversation have taken place in your store?

A. Yes, sir; it did.

Q. And can you tell us approximately when it was that the conversation took place?

A. We had a series of conversations on the same subject during July and August of 1956.

Q. And what did Mr. Carr tell you during these conversations?

Mr. Gesell: Your Honor, I don't want to interrupt again. Do I have a continuing objection to this type of thing?

The Court: You have. You have a continuing objection to all this type of testimony—with the same ruling.

Mr. Gesell: Yes, sir.

The Witness: Mr. Carr tried to pacify me. He said, "You are one of our volume customers. We don't want to tread on your corns so that you will stop doing business with us. But Parke Davis will not sell us if we sell you and another group of stores which they have named. We have a list which we cannot sell to. If we sell to you, we will lose Parke Davis, and we cannot stay in business without having Parke Davis. [fol. 50] It is one of our major lines.

By Mr. Kenney:

Q. Now did you, I think, testify that in addition to Mr. Carr you put in telephone orders?

A. Yes, sir.

Q. Is that the way you regularly put in orders to wholesalers here in the District?

A. This is a routine procedure.

Q. What happened to your telephone orders?

A. They were all marked as out of stock.

Q. After the wholesaler gets your telephone order, does he send you a list of the products which you have asked for?

A. Yes, sir; he does.

Q. And these were marked out of stock as to the Parke Davis products?

A. They were marked on the invoice, the item, and then alongside of it, "Out of stock."

Q. Now could you tell us, Mr. Haft, approximately how long it was during this period that you were without Parke Davis products, in the sense that you could not get your orders filled from either Parke Davis or the wholesalers?

Mr. Gesell: I object to that as being vague and indefinite. What sense is that? The question is did he have them or [fol. 511] not.

The Court: I didn't get the question. I was looking at something.

Mr. Kenney: I will repeat it, Your Honor. It was a little vague and indefinite.

By Mr. Kenney:

Q. After the time which you have covered here when you again resumed advertising Parke Davis products at cut prices, could you tell us how long a period went by when you were unable to get Parke Davis orders filled?

A. We could not get Parke Davis orders filled, with one exception, that is, from July 3d, 1956, to August the 28th that exception being from approximately July the 19th to the 27th, in which I had reached an agreement not to advertise and they had shipped me these small amounts. But the basic period of time was July the 3d to August 28th.

Q. Now I want to direct your attention to the 28th of

August, 1956, and ask you if on that day you had a conversation with Mr. Dripps and Mr. Powers.

A. Yes, sir; I did.

Q. And where did this conversation take place?

A. In my offices at 18th and Columbia Road, Northwest.

Q. Did you know that Mr. Dripps and Mr. Powers were [fol. 52] going to visit you on this day?

A. No, sir; I did not.

Q. Did they just drop in?

A. Yes, sir.

Q. Now at the time they came, were you conversing with anyone else?

A. Yes, sir; I was.

Q. And who was that?

A. That was Mr. Story, from the— his exact designation would be the Antitrust Division, or——

Q. Of the Department of Justice?

A. Of the Department of Justice.

Q. Was any reference to this visit of Mr. Story made in your conversation with Mr. Dripps and Mr. Powers?

A. Yes, sir; it was.

Q. Did they learn who Mr. Story was?

A. Yes, sir. When they came into the office, I apologized. I kept them waiting for a period of time. I apologized for keeping them waiting. And then I told them I just had someone else in the office. And the question of Antitrust Division came up, and they said they were well aware of it, and this was one of the reasons they were in the office—they understand that the Antitrust Division was investigating them all over town.

[fol. 53] Q. Did you have further conversation with Mr. Dripps and Mr. Powers at this time?

A. Yes, sir; I did.

Q. And what was said by them and by you during this conversation?

A. They asked me if I had had enough, if I was willing to agree to their terms. And I asked them what they had in mind. And they said if I would discontinue advertising, as per the former agreement, take the signs out of the window, and take the paper signs from on the window, that they would resume shipment, in so far as there was an Antitrust investigation going on.

Q. Did you make any agreement with them at this time?

A. Yes, sir; I did.

Q. And what was this agreement?

A. The agreement was that I would stop advertising, take my signs off the window, take the little cards which are in the window on Parke Davis merchandise out of the window——

Mr. Gesell: Your Honor, I move to strike that. That is a conclusion. I think the witness should say what conversations he had.

The Court: State what conversations you had and what [fol. 54] you did.

The Witness: Well, I actually removed—discontinued advertising, took the signs off the window, and took the cards out of the window—per my agreement with them.

By Mr. Kenney:

Q. You stopped advertising——

Mr. Gesell: Just a moment, if Your Honor please.

The Court: That last statement may be stricken.

You said what you did.

The Witness: Yes, sir.

The Court: You said what they asked you to do.

The Witness: Yes, sir.

The Court: And that was it?

The Witness: Yes, sir.

The Court: All right.

By Mr. Kenney:

Q. Now, Mr. Haft, was anything further said during this conversation between you and Mr. Dripps and Mr. Powers on the 28th of August?

A. We had a discussion of a nature that they had gotten Standard Drug, Babbitt, Tates, Peoples and all the rest of [fol. 55] the retailers back in line as far as in reference to advertising and window displays on Parke Davis items.

Q. Now after this particular conversation on the 28th of August, were you able to again obtain Parke Davis products direct from the company?

A. Yes, sir; I was.

Q. On this same day did you have occasion to have a conversation with anyone in the District Wholesale Drug Company?

A. Yes, sir.

Q. And who was it?

A. That was Mr. Phil Levin.

Q. And where did the conversation take place?

A. It took place at the Statler Hotel, at 16th and K Street, Northwest.

Q. And what was said by you and Mr. Levin at this conversation?

A. Mr. Levin—this was later in the day after the visit of Mr. Dripps and Mr. Powers,—said that he had heard from Parke Davis and he could now resume shipping me Parke Davis items from their warehouse—District Wholesale Drug.

Q. And did they ship you after this time?

A. Yes, sir; they did.

[fol. 56] Q. Now, Mr. Haft, did you continue to not advertise Parke Davis products for some time after the 28th of August?

A. Yes, sir; I did.

Q. Can you tell us approximately for what period of time you discontinued this advertising?

A. To approximately some time in November, when Standard Drug ran a cutrate advertisement on Parke Davis items. And then the following, shortly thereafter, I ran an advertisement on Parke Davis at a cut price.

Q. Did you have a conversation with Mr. Dripps about this Standard Drug ad?

A. Yes, sir; I did.

Q. Was this a telephone conversation?

A. Yes, sir; it was.

Q. And did you call Mr. Dripps, or did he call you?

A. I don't recall, sir.

Q. Can you tell us what was said at this time?

A. We were both aware of the Standard Drug ad.

Mr. Gesell: I object to that. The question is what was said.

The Court: It may be stricken. Answer the question directly. Answer it.

The Witness: I told him that I would advertise the follow-
[fol. 57] ing week, in answer to the Standard Drug ad. He

asked me if I wouldn't advertise, and give him a chance to straighten the situation out. And I refused.

By Mr. Kenney:

Q. And you did advertise the following week?
A. Yes, sir; I did.
Q. But nevertheless Parke Davis continued to ship you after this advertisement?
A. Yes, sir; they did.

Mr. Kenney: Would you please mark this Government Exhibit for identification No. 2?

(Newspaper ads, Evening Star, between July 12 and September 27, 1956, were marked for identification as Government Exhibit No. 2.)

(The advertisements were handed to counsel for defendant.)

By Mr. Kenney:

Q. Mr. Haft, I am going to show you some newspapers and ask if these are ads of yours which were in the Evening Star between the dates of July 12, 1956 and September 27, 1956.

Mr. Kenney: Your Honor, in this connection I have not the actual newspapers in there. I have prepared a compilation; and after all the newspapers go in, I will see that you get a copy.
[fol. 58] The Court: All right.
The Witness: Yes, sir; these are my ads.
Mr. Kenney: Your Honor, I offer Government Exhibit for identification No. 2 into evidence.
The Court: Is there any objection?
Mr. Gesell: No objection, Your Honor. I take it these are the ads of July 12th, August 9th, and September 27th. Is that correct?
Mr. Kenney: Yes, I believe it is.
Mr. Gesell: I think we might identify the dates.
The Court: Yes, they may be identified.
Mr. Kenney: This is July 12th, August 9th, and September 27th.

Mr. Gesell: Thank you.
The Court: They may be received.

(The newspaper ads heretofore marked for identification as Government Exhibit 2 were received in evidence.)

Mr. Kenney: Would you please mark this Government Exhibit for identification No. 3?

(Dart Drug ads in Washington Post July 6 through October 11, 1956 were marked for identification as Government Exhibit No. 3.)

[fols. 59-60] By Mr. Kenney:

Q. Mr. Haft, I will show you Government Exhibit for identification No. 3 and ask you if this is a series of newspaper advertisements from the periods July 6, 1956 through October 11, 1956, covering your Dart Drug advertisements in the Washington Post (handing).
A. Yes, sir; it is.

Mr. Kenney: For the Court's and Mr. Gesell's information, this is a series of ads in the Washington Post by Dart Drug under date of July 6th, July 19th, July 26th, August 2d, August 16th, August 23d, August 30th, September 6th, September 13th, October 4th and October 11th.
I now offer Government Exhibit 3 into evidence.
Mr. Gesell: No objection.
The Court: It may be received.

(The newspaper advertisements heretofore marked for identification as Government Exhibit No. 3 were received in evidence.)

(Following brief recess:)

[fol. 61] By Mr. Kenney:

Q. Did you handle Parke Davis pharmaceutical products?
A. Yes, sir.
Q. Both prescription and non prescription?
A. Yes, sir.
Q. Were most of your advertisements confined to vitamin advertisements?
A. Yes, sir.

Q. And in these advertisements do you show the price at which Parke Davis wants you to sell and the price at which you sell?

Mr. Gesell: I think he is leading.

The Court: Decidedly leading.

Mr. Kenney: I think the government should have a little leeway in leading in this case, because all of the witnesses——

The Court: He can answer that as a direct question, can't he?

Mr. Kenny: I will get into something else, your Honor.

The Court: Ask him what he put in his advertising. He knows.

By Mr. Kenney:

Q. What did you put in your advertisements?

[fol. 62] A. In the advertising I have the first column consists of the Parke Davis suggested resale price; the second column lists the item in question; the third column lists the size of the item if it is more than one size; the fourth column lists my discount price for one package; and the fifth column lists my discount price if they buy a multiple of three.

Q. That is listed here (indicating)?

A. Yes.

Mr. Kenney: Please mark this Government's Exhibit for identification number 4.

The Court: Do you have a copy of that?

Mr. Kenney: Yes, sir.

(Government's Exhibit No. 4, a one page document listing Parke Davis products and price list, was marked for identification.)

By Mr. Kenney:

Q. I will show you Government Exhibit Number 4 and ask you if you can identify that?

A. Yes, sir, I can.

Q. What is it, please?

A. This is a list of Parke Davis vitamins which gives the list prices, the items, the size of the items, my selling price

in one, my selling price in three, and my net cost price for an item direct from Parke Davis.

[fol. 63] Q. Could you tell us how you figured your net cost price for these items?

A. I figured this with the aid of Mr. Richard Cummings, the Parke Davis Sales Manager for my territory.

Q. With Mr. Cummings?

A. Yes, sir.

Mr. Kenney: I offer this in evidence.

The Court: Any objection?

Mr. Gesell: No objection.

The Court: May I see it, please?

(The document was handed to the Court.)

The Court: All right, it will be received in evidence.

(The one-page document heretofore marked for identification as Government Exhibit Number 4 was received in evidence.)

By Mr. Kenney:

Q. Now Mr. Haft, is the cost which you show for these vitamins to you the same cost as shown in the Parke Davis catalog?

A. No sir, it is not.

Q. Can you tell us why it isn't?

A. Yes, sir.

Q. Would you please explain, like for instance let's take [fol. 64] Abdol "C", the cost you show is a dollar and fifty-two cents?

A. Yes, sir.

Q. Do you know what the cost as shown in the Parke Davis catalog is?

A. Somewheres over two dollars.

Q. Well can you tell us why your cost on Abdol "C" would be different than the cost to you shown in the catalog?

A. Yes sir, I can.

Q. Would you please tell us?

A. You start with Abdol "C" in a bottle of hundreds. The cost in the catalog is two dollars and some cents.

If I had some figures here I could give you an exact computation.

Q. Would they help you (indicating)?

A. Yes, sir, it would.

Abdol with "C" is listed in the catalog at two dollars and seven cents. If you buy a small amount such as a dozen, that would be the price that Parke Davis charges you.

However, when you go into a volume purchase they will give you a certain number of bottles free which, with your purchase, to illustrate——

[fol. 65] The Court: Well that would bring down your cost? That is what you mean?

The Witness: That would bring down your cost, yes.

Furthermore, in a volume purchase, which it will not do with a normal purchase, they will give you other moneys which they referred to as their R.P.P. Plan.

The Court: You say moneys?

The Witness: They will give you other money, yes sir. So much per bottle. In the case of Abdol with "C" they will give you twenty five cents a bottle. So starting at a cost of two dollars and seven cents a bottle——

The Court: Do you mean they credit you with that or do they hand you that money?

The Witness: They give you a check for it, sir.

The Court: I see. All right.

The Witness: Starting with a two dollar and seven cent cost, figuring your free goods in and the money they give you per bottle for a volume purchase, it brings the cost down to a dollar fifty-two.

By Mr. Kenney:

Q. Is that generally true of all of the articles, all of the [fol. 66] vitamins listed in Government's Exhibit number 4?

Mr. Gesell: Is what generally true?

Mr. Kenney: Is that the way you figure your cost on volume purchases.

The Witness: Yes sir, with one exception.

At the top of the list there is a Thera Combex which is a very slow mover. There is no volume rebate on that; and I think that everything else with the possible exception of

Natabec, Thera Combex and Natabec. I do not think of a lower item.

By Mr. Kenney:

Q. Do you always buy in such volume that you get these credits?

A. Yes sir, we do.

Q. Now, Mr. Haft, after your conversation with Mr. Dripps in November, which you testified to earlier, did you continue to get Parke Davis products?

A. Yes sir, I did.

Q. Are you still getting them?

A. No sir, I am not.

Q. Can you tell us for how long a period of time you have not been getting them?

A. Since December 12, 1957, Parke Davis has not been shipping me.

[fol. 67] Mr. Kenney: Will you please mark this Government Exhibit number 5 for identification?

(The letter from Parke Davis Vice-President, Secretary and General Counsel, dated Dec. 12, 1957, to Mr. Haft, was marked Government's Exhibit No. 5 for identification.)

By Mr. Kenney:

Q. I will show you Government's Exhibit for identification number 5 and ask you if you can identify it?

A. Yes sir, I can.

Q. What is it, sir?

A. This is a letter from the Vice-President, Secretary and General Counsel, of Parke Davis.

Q. To you?

A. To me.

Mr. Kenney: Your Honor, I offer Government Exhibit for identification number 5 in evidence.

The Court: Have you seen it?

Mr. Gesell: Yes, your Honor. No objection.

The Court: It may be received.

(The letter heretofore marked for identification as Government Exhibit No. 5 was received in evidence.)

By Mr. Kenney:

Q. Now since that letter, which is Government's Exhibit [fol. 68] Number 5, dated December 12, you have been unable to obtain Parke Davis products direct from that company?

A. That is right, sir.

Q. Were you ever told why this cut-off took place?

A. The letter merely stated that they no longer desired to do business with me.

Mr. Kenney: May I have a second, your Honor?

The Court: Yes.

Mr. Kenney: Your Honor, the Government passes this witness at this time.

The Court: Cross-examine.

Cross-examination.

By Mr. Gesell:

Q. Mr. Haft, for how long now have you been advertising cut prices on Parke Davis goods? You did it throughout 1957, did you not?

A. Yes, sir.

Q. Regularly?

A. Yes, sir.

Q. And you have done it with considerable frequency in 1958?

A. Yes, sir.

Q. And you advertise cut prices on Parke Davis goods [fol. 69] in the latter part of 1956, beginning when?

A. Approximately November of 1956.

Q. And you have been obtaining your Parke Davis products from wholesalers, and other sources, is that right?

A. What period, sir?

Q. During the period since November 1956 up until the present time.

A. November of 1956 until December 12, 1957, I obtained Parke Davis from both Parke Davis and wholesalers.

However, since December 12, 1957, I have been obtaining it from wholesalers only, and not from Parke Davis.

Q. Now you say that your arrangement with Mr. Powers

was that you would not advertise Parke Davis products at cut prices. But you were frequently——

Mr. Kenney: Which arrangement was this, Mr. Gesell?
Mr. Gesell: The same arrangement.

By Mr. Gesell:

Q. Was there any difference in arrangement with Mr. Powers about advertising?

A. We had the same arrangement.

Q. There wasn't any difference in them?

[fol. 70] A. No, sir.

Q. Well, now, your arrangement was that you would not advertise but you were free to charge cut prices in your store, weren't you, over the counter?

A. Yes, sir.

Q. And you did?

A. Yes, sir.

Q. During both periods that you have talked about that you had an understanding or arrangement with Mr. Powers, the earlier period and the subsequent period, you charged cut prices in your store?

A. Yes, sir.

Q. And you also understood from your talk with Mr. Powers, didn't you, that of course if anybody else advertised that you were perfectly free to advertise, if anybody else in the District of Columbia advertised cut prices on Parke Davis goods?

A. No, not from Mr. Powers. I said that if anyone else advertised I would, and the minute that someone else did, and I advertised, they cut me off again. So he never agreed to that. But I put that in the condition.

Q. He simply said that if you didn't advertise he wouldn't —if you did advertise he wouldn't sell to you, and if you didn't he would?

[fol. 71] A. That is right, sir.

Q. And you said to him that if somebody else advertises I am going to advertise?

A. That is right, sir.

Q. Well now, how long do you say that this second arrangement or understanding existed? When did it start?

A. August 28, 1957.

Q. It would be '56, would it not?

A. 1956, yes.

Q. And from the 28th of August how long did you say it continued?

A. Approximately November of 1956.

Q. When you say Standard Drug had an ad?

A. Yes, sir.

Q. I want to show you an advertisement of Standard Drug in the Washington Post and Times Herald dated September 30, 1956, advertising Parke Davis Abdol at cut prices.

A. I am familiar with this ad, sir.

Q. Now that ad appeared in the paper at that time, did it not?

A. This appeared two days after; approximately two days after agreement. I was aware of this. However, it was too late for this ad to be withdrawn. So that, even [fol. 72] though our agreement was on August 28th, we didn't consider this as a violation. The mechanism of withdrawing it was too soon.

Q. What do you mean "we didn't consider this a violation"? You mean you didn't?

A. I didn't.

Q. But under what you had told Mr. Powers you were perfectly free after that ad came out to advertise at cut prices, weren't you?

A. I was perfectly free, yes sir.

Q. Now will you explain to me how it is that September 30 is two days after the 28th of August?

A. Is that September 30th?

Q. Yes. Will you explain how it can be two days after?

A. No; this is September 30th.

Q. Well, what is your testimony now?

Mr. Kenney: Well now, I object to this form of questioning.

The Court: Cross-examination. Your objection is overruled.

Mr. Kenney: Well I object to the abusive tone of voice rather than to the question itself, your Honor please.

The Witness: This is an ad that is run by Standard, but [fol. 73] this is the first time I have seen it. I have no recollection of it, sir.

By Mr. Gesell:

Q. You testified a moment ago you were familiar with the ad.

A. I am familiar with their ads, sir. But I have no recollection of this particular advertisement, sir.

Q. So the explanation you gave about that ad you want to withdraw as being correct?

A. No, no.

Q. You want to say that this is still the ad that was too late to stop on the 27th of August?

A. No. My best recollection is, the 28th of August Mr. Dripps told me that everyone else would stop advertising; that if I saw any ads in the coming week that they would be ads that were too late to stop, since there is a lag of time between a placement of an ad and a stop-order.

Looking at this without realizing it is September 30th, I thought it was August 30th. I thought that this might have been in the category of one of these ads that were too late to stop.

However, when you bring my attention to the fact it is September 30, it was not in that category, and I have no [fol. 74] actual knowledge of this ad, sir.

Q. Now you testified concerning a conversation with Mr. Walker; remember?

A. Yes, sir.

Q. Do you remember testifying about that?

A. Yes, sir.

Q. And you remember testifying that you said that Mr. Walker was asking you to agree to Parke Davis' terms? Do you remember testifying to that here this morning?

A. He wouldn't state Parke Davis' terms in a written communication. That is what I recall.

Q. You don't recall now then that he did say anything about trying to get you to agree?

A. He asked me if I had had enough.

Q. Will you answer my question, Mr. Witness?

A. This might have been in the conversation.

Q. Well was it, or wasn't it?

A. I do not know, sir.

Q. You do not now recall whether he used the word "agree" or he didn't?

A. I can't recall any specific words. Only the substance of the conversation.

Q. I want to direct your attention to your testimony on the criminal trial which appears at Page 65 of the trans- [fol. 75] script, when you were testifying concerning your conversation with Mr. Walker.

You testified at that time about that conversation this way:

> "Question. Did you say anything to Mr. Walker during this conversation?
>
> "Answer. Well I just mentioned that maybe there was some area of agreement we could have, and he said nothing doing, it is you get in line or you have nothing to talk with me about."

Do you remember being asked that question by Mr. Kenney and giving that answer?

A. Well you refresh my recollection and I do. When you refresh my recollection I do, sir.

Q. Are you now clear that Mr. Walker said nothing to you about agreement in that conversation?

A. My present recollection is of the substance of that conversation; after your refreshing my recollection I recall this conversation.

Q. You recall Mr. Walker saying "It is a question of get ting in line and that is all there is, and there isn't any area of agreement"?

A. That is right, sir.

Q. It is a fact, isn't it, Mr. Haft, that insofar as that, after that first conversation with Mr. Cummings and Mr. [fol. 76] Brown on the 3rd of July concerning which you testified that you made a written memorandum of the con versation?

A. I made it at the time of the conference. They refused to give me anything in writing, which is unusual, so that I made a written record. After the conversation had ended I dictated a memorandum, which was merely the substance of the conversation in their presence, and asked them if this wasn't the substance of the conversation.

Q. And it was written out in longhand? Wasn't it, sir?

A. Yes, sir.

Q. And the contents of that memorandum were shown to Mr. Cummings and Mr. Brown right at the time?

A. We read it to them, yes sir, and showed it to them.

Q. Right on the day and moment of the conversation?

A. That is right, sir.

Q. And that memorandum contains an accurate statement of what occurred at the conference, doesn't it?

A. Well —

The Court: Can't you answer that? Is it accurate or not?

The Witness: It is an accurate account of the substance [fol. 77] of the conversation and not the full conversation, sir.

By Mr. Gesell:

Q. Well you would say that it is exactly what you talked about, would you not?

A. Yes, sir.

Q. You understood what these men told you, did you not?

A. I think so, sir.

Q. You understood it?

A. Yes, sir.

Q. And you had no difficulty understanding Mr. Dripps when you talked to him as to what he was saying, did you?

A. No, sir.

Q. Or Mr. Powers?

A. No, sir.

Q. Well then what was all this business about getting it in writing? You understood what the policy was, didn't you?

A. The business of getting it in writing was that my attorney had informed me it was an illegal agreement, or he thought it was, and where there was a question of the legality of it he said, on his advice, "Don't enter into any agreement without having a written record," and they [fol. 78] refused to give me a written record. So to have some memorandum we wrote this down. That was the business.

Q. You understood what the policy was? You had no question about the policy?

A. No, sir.

Q. You understood what it was?

A. Yes, sir.

Q. Now isn't it clear that you had made it known to these men from the beginning that you were going to the Anti Trust Division and that you were going to complain about this matter?

A. No sir, I did not.

Q. You didn't mention that to Mr. Walker in the conversation with him?

A. In the conversation with Mr. Walker?

Q. Yes, sir.

A. There might have been mention of the Anti Trust Division. They came into the picture at that time.

A. And you mentioned it earlier with Mr. Cummings, telling him you had friends in the Anti Trust Division, did you not?

A. No sir, I did not.

Q. You never mentioned it to Mr. Cummings?

[fol. 79] A. At the July 3rd conversation?

Q. Yes.

A. No sir, I did not.

Q. In any subsequent conversation?

A. It couldn't possibly have come under discussion, because they were aware of it after July 3rd when the investigation started.

Q. How soon after July 3rd did you run down to the Department of Justice and complain?

A. I don't know the exact time.

Q. About how soon?

A. Sometime in July.

Q. Early in July or late in July?

A. I couldn't tell you exactly, sir.

Q. And didn't you tell these people as you talked to them, Mr. Powers and Mr. Dripps and Mr. Cummings, that you had made a complaint and that the Anti Trust Division was also in this?

A. I don't know whether they told me or I told them. There might have been a discussion about it because it was general knowledge at that time.

Q. And they went right on with the policy, did they not?

A. I don't have the exact sequence of whether the discussion was at the time that they continued selling or were [fol. 80] discontinuing selling, so I couldn't answer that question, sir.

Mr. Gesell: Will you mark this document as Defendants' Exhibit 1 for identification, please?

(The document referred to was marked Defendants' Exhibit No. 1 for identification.)

By Mr. Gesell:

Q. I show you Defendants' 1 for identification and ask you if this is a photostat of your memorandum of your conference with Mr. Cummings about which you testified a moment ago?

A. Yes sir, it is.

Q. How many Parke Davis products, Mr. Haft, did you carry? You said the full line. Does that mean you carried some six hundred different Parke Davis products then?

A. I don't know the exact number. That seems like a reasonable figure.

Q. Approximately that?

A. A reasonable figure.

Q. How many of those products did you follow the practice of advertising at cut prices?

A. Well it would be the number of vitamin products on that list in the normal advertising.

[fol. 81] Q. By "that list" you mean Exhibit number 4?

A. Well, I don't know it by number, sir.

Q. There are twelve vitamin products on Exhibit number 4. Is that the list you are referring to (showing document to witness)?

A. Yes, sir. I could answer by twelve, or approximately that.

Q. Now do I understand that it is your testimony that all of the other 600 products you also consistently cut prices on?

A. My policy is—

Q. Or only some of them?

A. My policy is to consistently cut on the majority of items. There might be some items which are infrequently sold and possibly are not cut. But the general policy is to cut the majority of them.

Q. During the period after July 3rd you referred to the fact that you had called attention of some of the Parke Davis people to the fact that the Peoples Store across from

you, on the corner from one of your stores, was cutting prices?

A. Yes, sir.

Q. You were cutting prices too at that time, weren't you?

A. Yes, sir.

[fol. 82] Q. And others around town were cutting prices too, weren't they? Or do you know?

A. Yes, I do know. Some were and some had already gotten back into line.

Q. Some were and some were not?

A. That is right, sir.

Q. Is it your testimony that on the 19th of July, after you talked to Mr. Powers about advertising on the first occasion, it was the 19th of July, wasn't it?

A. It was in the vicinity of the 19th.

Q. Is it your testimony that at that time Standard was not cutting prices?

A. No, that was not my testimony, sir.

Q. That Peoples was not cutting prices?

A. I didn't——

Q. You don't know whether they were or weren't on the 19th of July?

A. Are you referring to advertisement or what?

Q. I am talking about cutting prices first.

A. On the 19th of July?

Q. Yes.

A. Will you take them one at a time?

Q. Standard?

A. On the 19th of July my best knowledge would be that [fol. 83] Standard was cutting at that time.

Q. Was Peoples cutting at that time?

A. Peoples was cutting in the store directly across from me, and at the store near a Standard Drug Store at Fourteenth and Park Road. They were not cutting city-wide, in their other stores.

Q. Was Babbitt cutting at that time?

A. At that time Babbitt was not cutting, sir.

Q. Connecticut Pharmacy was cutting, wasn't it?

A. Connecticut Pharmacy was cutting sometime in that period. I couldn't pinpoint to July 19th.

Q. Now I want to direct your attention to this Defendants' Exhibit number 4 ——

Mr. Kenney: That is Plaintiffs Exhibit 4.

Mr. Gesell: Plaintiffs Exhibit 4. Excuse me, Mr. Kenney.

By Mr. Gesell:

Q. You were testifying from Plaintiffs exhibit 4 that the net list price was two dollars and seven cents for Abdol "C". Isn't that right?

Mr. Kenney: Your Honor, I don't think that is quite accurate. I don't think he was testifying about——

The Court: Let him say what he was testifying to. If it is not right he can answer it.

[fol. 84] Mr. Gesell: I understood the witness to say that the net list price for Abdol "C" was two dollars and seven cents.

The Court: Is that right, or not?

The Witness: I did not testify. We were talking about costs, sir.

The Court: He is talking about costs. He did not so testify in that respect.

By Mr. Gesell:

Q. You say then the net cost was two dollars and seven cents if you didn't buy in quantity?

A. I testified from the invoice which I have in front of me which is the net cost from your voucher, at two dollars and seven cents.

Q. So that that was the net cost to the trade for Abdol "C" if it was not bought in quantity?

A. This is from your invoice. Now whether this coincides with whatever you sell to—whatever you have in your catalog or anything else, I have no knowledge of it.

The Court: Well whose cost is that? The cost to whom?

The Witness: This is the cost actually to a direct account of Parke Davis.

The Court: To whom? Is that the cost to you?

[fol. 85] The Witness: This is the cost to me, sir.

The Court: From Parke Davis?

The Witness: This is all I know.

The Court: All right.

By Mr. Gesell:

Q. So that if you had not bought in quantity, then you were advertising at a price which was below the net cost price; isn't that right?

A. Yes, sir.

Q. You were advertising at a dollar and ninety nine?

A. A dollar ninety nine. If I had not bought in quantity that would have been below the net cost, yes, sir.

Q. Assuming that that net cost applied generally to the trade you were advertising at a price below the net cost to those in the trade who weren't buying in quantities, isn't that right?

A. That is right, sir.

Q. Now I understood you to testify when you were showed various advertisements that you followed the practice of showing the suggested minimum resale price and your own price; that isn't correct, is it?

A. I follow the policy of putting your list price from your catalog in column one.

[fol. 86] Q. Not the suggested minimum resale price?

A. Well there is a difference between it. There is a ten per cent differential between your list price and your suggested minimum.

Q. When did you first consult with your attorney about perhaps bringing a private suit against Parke Davis?

A. I have brought no suit against Parke Davis.

Q. That isn't my question.

A. We have brought no suit against you, sir.

Q. That isn't my question.

A. When did I first discuss the matter with them, is that your question?

Q. Yes. I said "consult". Discuss is all right.

A. Sometime during the period in which you people refused to ship me, and that my business was being harmed.

Q. Before or after you went to the Department of Justice?

A. I do not have a definite recollection, sir.

Q. Did you testify that you put in a daily order to District and Gilpin for Parke Davis products?

A. My testimony was that I put in a daily order to District Wholesale Drug, and that normally there would be

[fol. 87] Parke Davis products. Normally there would be Parke Davis products daily.

Q. During the period you were cut off it is your best recollection that you made a daily request for Parke Davis products from District?

A. I don't know if I made daily requests, sir. But normally—

Q. I asked you what you did.

A. I do not know, sir. We would normally have Parke Davis products on every daily order. Whether we actually did I do not know.

Q. So you don't really know how many times you ordered Parke Davis products from the Wholesalers, do you?

A. I would not have firsthand knowledge of how many times we ordered from the wholesalers, no sir.

Q. Is it your testimony you never were able to get any Parke Davis products during the period you were cut off from District Wholesale?

A. District never would ship me Parke Davis products.

Q. Never?

A. It was not my testimony that we were never able to get it. I think that after a search of the District files that sometime in that period they slipped up on maybe one [fol. 88] occasion or so.

Q. Now who told you they slipped up on an occasion? Mr. Kenney? Where did you get that particular information?

A. This is only summary on my part, sir.

Q. Where did you get the information that after a search of their files? Who told you that?

A. Somewheres in this testimony where there was in the criminal case a group of District Wholesale Drug invoices showing where we had ordered them during that period and where they had been continuously marked out; and my best recollection is that one of those invoices, it had been shipped.

Q. Well now, what is your testimony now? Did you or did you not get goods during the period you were cut off from District Wholesale?

A. I did not get goods, sir.

Q. Of any kind, ever?

Mr. Kenney: We are talking about Parke Davis goods, I assume?

Mr. Gesell: Yes.

The Witness: I might have gotten one daily order.

By Mr. Gesell:

Q. Might you have gotten more than one?

[fol. 84] A. I have no definite knowledge.

Q. You might have?

A. I might have, yes sir.

Q. Is your testimony the same as to Gilpin?

A. I do not know, sir.

Q. You don't know whether you got goods from him or not?

A. My best recollection is that I did not get any goods from Gilpin. However

Q. You do not know?

A. I do not know, sir.

Q. Mr. Hafft, when a customer comes into your store, in response to one of your cut-price advertisements for a Parke Davis vitamin product, do your salesmen urge the customer to buy your own Kent brand instead of the Parke Davis product?

Mr. Kenney: Objection, your Honor. Completely immaterial and has no relation with the direct.

The Court: Overruled.

The Witness: My policy is to sell what we advertise, which is attested by the volume of Parke Davis merchandise that we sell, if a customer is looking for a further saving and asks if there is anything on the market that they can save more money with, or there is an open suggestion, we will try to sell our own products.

[fol. 90] By Mr. Gesell:

Q. I want to know not your policy but I want to know what happens in your store.

A. What I said

Q. Your salesmen get a commission when they sell Kent products, don't they?

A. Yes sir, they do.

Q. But not when they sell Parke Davis products?

Mr. Kenney: Objection.

By Mr. Gesell:

Q. They don't get a commission when they sell Parke Davis products, do they?

A. No, they don't.

Q. Isn't it true that time and time again customers come into your store asking for Parke Davis and your salesmen switch them to Kent?

A. No sir, it is not.

Q. You say that has never happened in your store?

Mr. Kenney: I object to that. You said it is something that happens all of the time. I object to the tone of voice, your Honor, and I continue to object to this line of questioning.

The Court: Well you have a very manipular voice, Mr. Gesell.

Mr. Gesell: I am sorry, your Honor.

[fol. 91] The Court: You sound as though you are a very good baritone singer.

Mr. Gesell: I can't keep on the tune, that is the trouble. I will get back a little bit.

The Court: Very well.

By Mr. Gesell:

Q. Do you say, Mr. Haft, that that has never happened in your store, that salesmen have not switched your customers from Parke Davis to Kent brand vitamin products?

A. No, I did not say that never had happened.

Q. You know it has, don't you?

A. I am sure it has.

Mr. Gesell: No further questions.

The Court: Redirect examination.

Redirect examination.

By Mr. Kenney:

Q. Now Mr. Haft, on this question of being able at this time to purchase Parke Davis products from wholesalers, is the cost the same to you as it is when you buy direct from Parke Davis?

A. It is substantially higher in cost when I buy from a wholesaler, as against when I buy from Parke Davis.

Q. Do the wholesalers give you these quantity discounts?

[fol. 92] A. No sir, they do not.

Q. Now on the subject of this meeting of July 3 between you and Mr. Cummings and Mr. Brown, you were acquainted with the Parke Davis policy on retail prices at that time, weren't you?

A. Yes sir, I was.

Q. Had you ever heard of this policy of not selling in a non fair trade area at less than suggested retail prices?

A. No, sir.

Q. You had never heard of it until that time?

A. No, sir.

Q. I believe your testimony too on the question of Peoples around the 19th of July, Peoples were advertising across the street from you by signs in their windows?

A. That is right, sir.

Q. That they had Parke Davis products at discount?

A. Yes, sir.

Q. Now I understand, Mr. Haft, that when you list your advertisements you have the full list price of the Parke Davis item?

A. Yes.

Q. The suggested minimum resale price is ten per cent less than the full list?

A. Yes, sir.

[fol. 92 a] Q. Now on this question of the orders to the District Wholesale, were you ever told by anyone in the District that they could not sell Parke Davis products to you?

A. Yes, sir.

Q. And who was that?

A. Mr. David Estrin.

Q. And he is the President?

A. Yes, sir.

Q. And it is possible during this period of time that we are covering here that a couple of orders might have slipped through?

A. It is possible, yes sir.

Q. But in your experience were you able consistently in the summer of 1956, during the time that you were cut off

by Parke Davis, able to obtain Parke Davis products from wholesalers here?

A. I was definitely unable to obtain them, sir.

Mr. Gesell: One question: Mr. Haft, since you say the wholesalers' price is substantially in excess of Parke Davis' direct price to you, it follows, does it not, that at the present time and for sometime past you have been selling Parke Davis products and advertising Parke Davis products below their cost to you?

The Witness: Yes, sir.

The Court: Anything further?

[fol. 92-b] Mr. Kenney: One further question:

When you say below the cost to you are you talking about the catalog cost or your actual cost, Mr. Haft?

The Witness: Catalog cost.

Mr. Kenney: But not your actual cost?

The Witness: No sir.

Mr. Kenney: That is all.

(Witness excused.)

The Court: The Court will recess until one forty-five.

(Whereupon, at 12:20 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day,)

[fol. 93] AFTERNOON SESSION

(Pursuant to recess, the trial was resumed at 1:45 o'clock p.m.)

The Court: Are you through with your former witness?

Mr. Kenney: Yes, sir.

The Court: Call your next witness.

Mr. Kenney: We have had to call around to get some witnesses to come because we had no idea we would finish the first witness as rapidly as we did.

The Court: You did the best you could.

Mr. Kenney: I hope it will go along all right.

The Court: I think it will.

Mr. Kenney: At this time the Government would like to move into evidence a Defense Exhibit No. 1 for identification as Government Exhibit No. 6.

The Court: You did not tender that in evidence. You merely had it marked for identification.

Mr. Gesell: This was not my case and that is right. I did not get to my case.

The Court: Then you have no objection?

Mr. Gesell: No, not at all.

The Court: Then it will be received.

[fol. 94] (A document previously identified as Defendant's Exhibit No. 1 was marked Government's Exhibit No. 6 for identification and received in evidence.)

The Court: Your witness did not study Spencerian handwriting, I can see that.

Mr. Kenney: No, sir, it is very hard to interpret it. I would be glad to have a typewritten copy prepared.

The Court: I can decipher it someway.

Mr. Gesell: One of the difficulties is that the photostat went through the page and took up some of the writing on the back part of the page. We could type it up.

The Court: I wish you would. It is just a waste of time trying to decipher this.

Mr. Gesell: On that, why do we not have one typed up and agree on it and hand it to your Honor?

The Court: All right, please.

Thereupon LEONARD RODMAN, was called as a witness by counsel for the Government and, being first duly sworn, was examined and testified as follows:

[fol. 95] Direct exaimnation.

By Mr. Kenney:

Q. Your name is Leonard Rodman?

A. That is right.

Q. And what is your address, Mr. Rodman?

A. Residence or work?

Q. Resident address?

A. 4547 Indian Rock Terrace, Northwest.

Q. Are you a partner in the McReynolds Drug Store of Washington, D. C.?

A. Yes, sir.

Q. How long have you been a partner in that drugstore?

A. Approximately ten years.

Q. Now, did McReynolds in 1956, and is McReynolds today, handling Parke, Davis Pharmaceutical products?

A. Yes, we are.

Q. How do you buy your products, Mr. Rodman, from Parke, Davis?

A. Most of Parke, Davis merchandise that moves in volume is bought directly from Parke, Davis. The fill-in items are bought from the wholesale houses.

Q. Do you buy the bulk of your purchases direct from Parke, Davis?

[fol. 96] A. That is right.

Q. Is there a reason for that, sir?

A. Well, many items have special incentive plans from Parke, Davis to the stores for moving their items in volume.

Q. You mean by that, that it is cheaper to buy direct from Parke, Davis?

A. It costs you less money to buy it direct from them.

Q. Now, Mr. Rodman, directing your attention to the summer of 1956, was McReynolds selling Parke, Davis products at cut prices?

A. Yes, sir.

Q. And was it advertising these cut prices in any way?

A. We had signs on our windows, that was the extent of our advertising.

Q. At this time were you familiar with the retail price policy of Parke, Davis as it applied to the District of Columbia?

A. There was no price policy in the District of Columbia where we have no fair trade.

Mr. Kenney: May I have Government's Exhibit No. 1, please?

[fol. 97] By Mr. Kenney:

Q. I will show you Government's Exhibit No. 1, and ask you if you can recognize it as the minimum retail prices for Parke, Davis?

A. Yes.

Q. You recognize that?

A. Yes, but it is not applicable to the District of Columbia.

Q. It does not apply to the District of Columbia, is that right?

Mr. Gesell: I can't hear the witness, your Honor.

The Court: The question was, did he recognize that, is that right?

Mr. Kenney: Yes, sir.

The Court: And the witness said, "Yes." The rest of the answer may be stricken.

By Mr. Kenney:

Q. Did you consider this was applicable to your operation of McReynolds Pharmacy?

A. No, that piece of paper, which is their plan, says, "Only in Fair Trade States."

The District of Columbia not being a Fair Trade area, [fol. 98] that did not apply to our particular operation.

Q. It was just suggested for the District of Columbia.

Prior to 1956, or prior to the summer of 1956, how long had you been advertising and selling Parke, Davis at cut prices?

A. For quite a while.

Q. Now, prior to the summer of 1956 had you ever heard of any other retail price policy of Parke, Davis than the one I showed you in Government's Exhibit 1?

A. There was no other price policy ever called to my attention.

Q. I want to direct your attention to the month of July, 1956, Mr. Rodman, and ask you if, at that time, Parke, Davis had a regular salesman in this territory who called on you?

A. Yes, they did, and his name was Tony Taneretti.

Q. Now, directing your attention to early in the month of July, 1956, I will ask you if you had a visit from Mr. Taneretti accompanied by Mr. Cummings?

A. Yes, we did.

Q. And who was Mr. Cummings at this time?

[fol. 99] A. Mr. Cummings was identified as the District Area Manager.

Q. The District Area Manager?

A. Yes, sir.

Q. And was he Mr. Taneretti's superior?

A. That is right.

Q. Now, did they visit your store early in July of 1956?

A. Yes.

Q. Do you know approximately, or specifically, on which day this visit took place?

A. Early in the month of July.

Q. Early in July?

A. Yes.

Q. Did you have a conversation with Mr. Cummings and Mr. Tancretti at this time?

A. Yes, I did.

Q. Would you tell us or can you tell us what was said by them and by you during this conversation?

A. Mr. Cummings did the speaking and he said, "I have an important message to deliver to you."

I said, "Yes."

So, we went into the office—which is right outside of our store—and Mr. Cummings informed me that it was the [fol. 100] policy of the main bosses that there will be no price cutting on Parke, Davis merchandise, and if we continue to cut prices, they will no longer sell us.

I said, "I think you must be off your nut. We are in a non-Fair-Trade area; I don't see what right they have to tell us at what price to sell."

Q. And what did they say in reply to that, if anything?

A. And he said, "Well, not only are we not going to sell you, but we are going to see that you do not get the merchandise."

Q. Was any mention made of your advertising of these products?

A. The advertising was our window signs and he asked us, that if we took all the signs off and did no advertising, they would sell us.

Q. And he said if you did not go along, you would not get any merchandise?

A. They would not sell us. We would not be able to get the merchandise not only from Parke, Davis, but they would see that we do not get it from the local distributor.

Q. From whom?

[fol. 101] A. From our local sources of supply, the wholesale houses.

Q. Now, did you agree to go along with this request?

Mr. Gesell: I object to that question.
The Court: What is the objection?
Mr. Gesell: Conclusion. Did he agree to go along.
The Court: Sustained.

By Mr. Kenney:

Q. Did you state anything affirmative to Mr. Cummings about his request?

A. I told Mr. Cummings I was not interested in agreeing to go along or not go along because other chain stores had advertised those prices and it would take me approximately six months to catch up this full-page ad that had appeared in the paper, and that I felt, when I had equaled their advertising, then I might be interested in going along.

Q. Did Mr. Cummings say that this was a written policy that he was talking to you about?

A. I asked Mr. Cummings if he would be good enough to give me a letter in writing, stating just what he wants me to do about this price cutting, and he said, "Well, we are not [fol. 102] going to give it to you in writing. This is it. This is the official notification."

Q. Now, after this visit, were you able to purchase Parke, Davis supplies direct from Parke, Davis for some period of time?

A. As of this visit, this day early in July, we were no longer able to buy any merchandise direct from Parke, Davis.

Q. For quite sometime.

Now, after this particular visit did Mr. Tanneretti visit you on any other occasions?

A. We were visited by Tony Tanneretti, but the visits were only of a personal or friendly nature and not relating to any Parke, Davis purchases.

Q. Would he take any orders from you?

A. We were unable to buy anything direct from Parke, Davis. Tony had asked us why don't we eliminate this fighting and buy direct from them, and stop this price cutting, we would make more money if we adhered to the price fixed.

Q. What wholesalers in this territory did you normally buy from?

[fol. 103] A. The majority of our purchases were made from District Wholesale Drug, also Gilman.

Q. At the time of this visit on July 3, did you have signs on your window, advertising the products of any other manufacturer than Parke, Davis?

A. Yes, we did.

Q. And were these advertisements at cut prices?

A. Yes, sir.

Q. After this visit, did you attempt to secure any Parke, Davis products from the District Wholesale Company here in Washington, D. C.?

A. Yes, we did.

Q. And to whom did you talk at District Wholesale in this connection?

A. Well, we were ordering a few of their most popular items that we had normally bought direct from Parke, Davis, and we ordered them from District Wholesale Drug after our supply was very low, or depleted, and the drug houses were marking them "Out" and I thought it was impossible that a drug house could be out of the most popular items in the line, so I called their sales manager, Mr. Phillip Levin, whom we were rather friendly with on a personal basis as well as business, and I said, "Phil, what is the story here?" [fol. 104] And he said, "I will be down to see you."

He came down to visit us personally, and told us it was the policy of Parke, Davis, they informed him that they can no longer sell us any Parke, Davis merchandise whatsoever, prescriptions, volume items, or any Parke, Davis items whatsoever; we would be unable to order from his wholesale house.

Q. Did he mention any other drugstores in this regard?

A. He informed me that there were five stores in total that were involved in this same situation.

Q. Can you recall at this time the name of any of these stores?

A. Oh, yes, sir. The five stores were McReynolds Pharmacy which I represented; Dart Drugs, Babbitt's, Standard and State Drugs.

Q. Now, at this particular time, Mr. Rodman, what was the approximate volume of business that you were giving District Wholesale on all items?

Mr. Gesell: I object to that. I do not see the relevance of his overall business.

The Court: You might explain its relevancy, Mr. Kenney.

Mr. Kenney: I want to show how serious this was because [fol. 105] this man was an excellent customer and yet when Parke, Davis approached this wholesaler, they still cut him off rather than deal with him.

Mr. Gesell: Not of all the products.

The Court: Well, I thought you said all of the products.

Were you cut off from all of the products?

The Witness: From all of the Parke, Davis products, yes, sir.

The Court: Overruled.

Answer the question.

The Witness: We were spending approximately $75,000 a year with District Wholesale Drug, and I said, "Phil, you mean if I need a few items of Parke, Davis merchandise, you will not supply them?"

He said, "Well, it is a choice of either being a Parke, Davis distributor, or your business. I have to pick Parke, Davis, because it means more dollars and cents in profit than your own account."

By Mr. Kenney:

Q. Now, did you also attempt at any time after the July visit, to obtain products from the Gilpin Wholesale Company here in Washington?

A. Well, we were a weaker customer with Gilpin, but we [fol. 106] had the same difficulty with Gilpin, also.

Q. Did you put in orders for products at Parke, Davis Products at Gilpin?

A. Yes, we did but we were unable to get them.

Q. You did not get them?

A. We did not get them.

Q. Mr. Rodman, during the summer of 1956 and thereafter, was McReynolds a member of a so called Drug Mart group of stores?

A. Yes, we were one of the charter members of an association of independent drug stores known as Drug Mart.

Q. And could you explain to the Court what this Drug Mart group was organized for?

A. Drug Mart was an association of independently-owned drug stores which banded together for cooperative adver-

tising, cooperative buying, and to meet some of the problems presented by larger chains and hard-hitting advertising outfits.

Q. To your knowledge was the Drug Mart group contacted by Parke, Davis during this period of time in 1956?

A. Yes. I can say that they were also contacted—our [fol. 107] coordinator, who at that time answered to me, since I was on several committees, and he was informed—

Mr. Gesell: I object to that.

By Mr. Kenney:

Q. Who was the coordinator?

A. Mr. Ben Davis.

Q. Yes, go ahead, sir.

Mr. Gesell: I object to the witness stating what he was informed by some third party.

The Court: Sustained.

Mr. Kenney: Now, your Honor, here again this is the question of a co conspirator. I think——

The Court: Which is the co-conspirator. I do not know which they are. These that are named here in the complaint?

Mr. Kenney: Yes, in the bill of particulars.

The Court: This man is representing McReynolds, is he not?

Mr. Kenney: Yes, sir.

The Court: Who is he talking to——

Mr. Kenney: He is also a member of the Drug Mart group of stores and the Drug Mart group of stores are co-conspirators in this case and coordinator for those stores, and I think his statement was clearly admissible subject to a [fol. 108] motion to strike.

Mr. Gesell: There is no claim that Mr. Davis is a co-conspirator.

The Court: I will sustain your objection.

He is not a co-conspirator, he does not represent a co-conspirator.

Mr. Kenney: He represents the Drug Mart Drug Group.

The Court: Is that the Drug Mart Drug Group? Is that a conspirator?

Mr. Kenney: Co conspirator, yes, sir.

The Court: Then I will reverse my ruling.

The Witness: Mr. Ben Davis was the coordinator for Drug Mart and I was on several committees, and he informed me that Parke, Davis had told him that if any advertising which we were doing weekly in the Star had Parke, Davis items at cut prices, that they would also stop selling any member of the group which roughly was about 30 stores.

By Mr. Kenney:

Q. Well, do you know whether the Drug Mart group went along with this suggestion?

A. No, after Mr. Davis was informed of the vote of the majority—not unanimously, but the majority—that they [fol. 109] would no longer advertise Parke, Davis at cut prices with the risk of losing the availability of the Parke, Davis items.

Q. And would they sell at cut prices thereafter?

A. They would not advertise. They could cut the prices inside but they would not advertise any of the items at cut prices.

Q. Now, were you following the advertising in the papers in this area pretty closely during the summer of 1956?

A. I follow them very closely.

Q. To your knowledge was there quite a period of time when no Parke, Davis Drug was advertised at a cut price by either Dart, McReynolds, Peoples, or the Drug Mart Group?

Mr. Gesell: I must object to the continued leading of this witness.

The Court: I will sustain it. This is direct examination. The witness is not stupid. You can get his answers out of him by direct questioning.

Mr. Kenney: No, he is not stupid, your Honor.

The Court: No indeed, he is not.

Mr. Kenney: I do not intend to lead him.

[fol. 110] The Court: I know. I know just exactly the way you feel. This is not casting any reflections. Any attorney would do as you are doing.

Mr. Kenney: I would like to point out, though, sir, that there may be considerable difficulty from time to time in the Government's case because most of the witnesses the Gov-

ernment is putting on here are co-conspirators in this case, and I think we should have a little leeway in direct examination.

The Court: Well, if you will explain it as you go along, you may get it.

Mr. Kenney: Yes, sir.

The Court: I think that is clearly leading, though. You will kindly ask him directly.

Mr. Kenney: Will you please mark this Government's Exhibit for identification with the next number?

Deputy Clerk: Government's exhibit 7.

(A group of Drug Mart advertisements 7-5-56 to 10-11-56 was marked Government's Exhibit 7 for identification.)

By Mr. Kenney:

Q. Mr. Rodman, I am going to show you Government's Exhibit for identification No. 7, which purport to be a group of Drug Mart advertisements in the Evening Star from the [fol. 111] period of July 5, 1956 to October 11, 1956, and ask you if you can identify those?

A. Yes, I can.

Q. And are they the Drug Mart advertisements for that period?

A. Yes, sir. It was roughly a period of about two months when not only did Drug Mart not advertise any Parke, Davis merchandise at cut prices, but no other chain or other group of stores advertised any Parke, Davis items at reduced prices, for roughly a little over 2 months.

Q. Do you know whether Standard might have slipped an ad in there?

A. No, I could say that Standard also did not advertise during that period, unless, of course, I missed it. But, to the best of my recollection, they did not advertise any Parke, Davis merchandise during that period.

Mr. Kenney: I offer into evidence Government's exhibit 7 for identification.

The Court: Have you seen these?

Mr. Gesell: I know what they are and there is no objection, your Honor.

[fol. 112] The Court: It may be received.

(The group of Drug Mart advertisements previously marked for identification Goverment's Exhibit No. 7 was received in evidence.)

Mr. Kenney: Would you mark this Goverment's exhibit for identification No. 8?

(A group of Peoples' Newspaper Advertisements was marked Government's Exhibit No. 8 for identification.)

By Mr. Kenney:

Q. Mr. Rodman, I am going to show you Government's Exhibit No. 8 for identification and ask you if you recognize these as being ads of the Peoples Drug Store in the Washington Post from the period July 6, 1956 through October 11, 1956?

A. Yes, I recognize them.

Q. You do recognize them as being Peoples Drug Store ads?

A. Yes, I do.

Mr. Kenney: I offer Government's Exhibit for identification No. 8 into evidence.

Mr. Gesell: I object to that. There is no proof that these are all the ads or part of the ads. The man has no qualifications with respect to Peoples Drugstore whatsoever.

[fol. 113] Mr. Kenney: He recognized the ads.

Mr. Gesell: This is newspaper reading.

The Court: Overruled.

The exhibit is received.

(The Peoples Drug ads previously marked Government Exhibit No. 8 for identification was received in evidence.)

Mr. Kenney: Would you please mark this Government's exhibit for identification No. 9?

(A group of newspaper ads was marked Government exhibit 9 for identification:)

By Mr. Kenney:

Q. I show you government exhibit for identification No. 9 and ask you if you recognize these as being ads put by the Peoples Drugstore in the Evening Star on the period July 5,

1956 to October 11, 1956? Do you recognize them as being the Peoples Drugstore ads?

A. Yes, I do.

Mr. Kenney: I offer into evidence Government's Exhibit No. 9 for identification.

Mr. Gesell: Same objection.

The Court: Same ruling.

(A group of newspaper ads which was previously identified Government exhibit No. 9 was received in evidence.)

[fol. 114] Mr. Kenney: Now, your Honor, in order that you will not have to pore through those newspapers, the Government has prepared a compilation of what they show, with appropriate symbols, and I will ask the clerk to mark this Government exhibit for identification No. 10 and we move it into evidence as a compilation of these newspaper articles.

Mr. Gesell has a copy of this.

Mr. Gesell: I do not.

Mr. Kenney: I sent you one.

Mr. Gesell: Yours is all in color. I have nothing with color in it.

Mr. Kenney: This is the original of it.

The Court: Well, examine it now, Mr. Gesell.

By Mr. Kenney:

Q. Now, Mr. Rodman, directing your attention to late August or early September of 1956, did you receive a call from some representatives of Parke, Davis?

A. Yes, we did.

Q. And was this in your store at McReynolds Pharmacy?

A. That is correct.

[fol. 115] Q. And who were these representatives?

A. We had two visitors from Parke, Davis, Mr. Sam Dripps and a Mr. Powers from Parke, Davis of Baltimore, Maryland.

Q. Can you tell us if you had a conversation with these gentlemen at this time?

A. The conversation went like this, Mr. Dripps said,

"Well, there is no reason why we have to continue our fight, why we can't get along, and do business with you."

"If you fellows would be willing to go along to the extent, since you do not advertise in the newspaper, if you would just take your signs down, we could again do buying and business together."

Q. And what did you say, sir?

A. Well, I personally thought it would be all right if we went along and took these signs down for a while, for a short while and took these signs down, so that we could get some of the merchandise that we needed from Parke, Davis.

Q. Did you tell Mr. Dripps that you would do this?

A. I think we agreed temporarily that we might take these signs down.

[fol. 116] Q. Did Mr. Dripps tell you what the purpose was of Parke, Davis not wanting these prices advertised?

A. I think Mr. Dripps said something that he did not want to start an all out price war in the District of Columbia.

Q. Now, after this visit did you again put in orders to Parke, Davis?

A. Yes, after Mr. Dripps called on us, we were then able to buy direct from Parke, Davis again.

Q. And did you stop advertising by signs in your window for a period of time?

A. We did stop all of our signs which was the only extent of our advertising, was signs on our window, until what time there appeared in the Star another ad from one of the stores around town that Parke, Davis had cut prices.

After that ad appeared, we then put our signs back up on the window at cut prices.

Q. This was approximately when? Can you tell us?

A. I would say about 2 to 3 weeks after Mr. Dripps had called on us, then the ad appeared in the paper and we were right back where we started.

Q. And after you again started advertising Parke, Davis [fol. 117] still continued to ship you, is that right?

A. Yes.

Mr. Kenney: That is all.

The Court: Cross examine.

Cross-examination.

By Mr. Gesell:

Q. And you have been selling Parke, Davis Products at cut prices since that time?

A. Yes, sir.

Q. And you have been putting signs in the window whenever you wanted to on your Parke, Davis products advertising your cut prices?

A. Yes, sir.

Q. You have been buying from Parke, Davis direct?

A. Since that time; yes, sir.

Q. And you have been able to buy from any wholesaler where you put in an order?

A. Yes, sir.

Q. Now, during the period of two or three weeks that you did not advertise, you still charged cut prices in your store, did you not, over the counter?

A. Yes, sir.

Q. Was it your practice to cut prices on all Parke, Davis [fol. 118] products or just on some items?

A. Just on some items.

Q. Mostly the fast-moving vitamin line?

A. The only items we discount in that particular store——

Q. Were vitamin items?

A. Were the items that moved in volume.

Well, other than vitamins, also——

Q. Yes, about how many in all out of the line?

A. We picked what we thought were about the fastest ten items.

Q. When you said you had a $75,000 business with District, you did not mean you had any business of that magnitude in Parke, Davis products, did you?

A. Parke, Davis was just a part of that $75,000.

Q. Well, as a matter of fact, you only bought $100 or $200 worth of goods a month of Parke, Davis, is not that right?

A. That would be correct.

Q. You bought substantial volume from the wholesaler, particularly of products where companies do not sell direct but sell only through wholesalers; is not that right?

A. That is right, yes, sir.

[fol. 119] Q. And the same is true with respect to your volume of business with Gilpin. It was not very substantial in Parke, Davis products as compared to your total volume of business with Gilpin?

A. Correct.

Q. Now, you said that an ad came out in the paper about three weeks after Mr. Dripps and Mr. Powers called on you the latter part of August——

A. Right.

Q. advertising a Parke, Davis product at cut prices.

I show you an advertisement of Standard Drug of Abdol at cut prices, appearing in the Washington Post-Times Herald of September 30 and ask you whether you recall that that was the advertisement that resulted in your again placing your products in the windows at cut prices?

A. To the best of my recollection, I would say that is approximately correct, sir.

Q. And, during the three weeks before this ad appeared, you understood that if any time you felt like it, you could go ahead and post your prices at cut prices in the windows again and take your chances as to whether you would get [fol. 120] delivery from Parke, Davis, is not that right?

A. If we wanted to gamble on that, but we also had agreed verbally that we would go along with taking our signs down.

Q. You told Parke, Davis you would take——

A. That we would take them down, yes. That was a verbal agreement. We did not sign any contract at that time.

Q. And they said that if you would take them down, they would sell you, is not that right?

A. Right.

Q. Now, on this question of Drug Mart, I would like to get a little clearer one or two parts of your testimony: You referred to a majority vote of a committee. What committee was that?

A. Well, we had an Executive Committee of Drug Mart.

Q. Are you a member of that?

A. I was at that time a member of that particular group.

Q. And who else was present at this meeting?

A. It had been polled, Mr. Davis did the work and made [fol. 121] the survey of the group.

Q. Oh, he polled the committee, took a cross-vote of what they wanted to do, and it was the opinion of the majority

that they did not want to have any fights or danger of not getting any Parke, Davis merchandise and being cut off, so he relayed the message to me, and I said, "Well, if that is what they want to do, I am personally not in favor of it; but if that is what they want to do, that will be it, the majority rules."

Q. That had to do only with the cooperative advertising of the Drug Mart Group, did it not, the ads that were put in on behalf of the whole group by the Drug Mart organization?

A. That was the only advertising we did, was the Group advertising.

Q. Now, I doubt if you mean that. Individual stores advertised in their windows.

A. Only advertising done was in newspapers?

Q. Yes.

But individual members of Drug Mart advertised in their windows?

A. I am sure they did.

[fol. 122] Q. And they could sell at cut prices, or not cut prices, or advertise them in their windows or not, and it was not affected by this newspaper advertising at all, was it?

A. If they were told the same thing that I personally was told, I would assume that they were under the same circumstances, that I could not advertise——

Q. Well, now, you mean if they were told that by Parke, Davis?

A. Yes, sir.

Q. But you have no knowledge that they were?

A. I do not.

Q. As a matter of fact, even Drug Mart did not regularly advertise Parke, Davis products, did it? It did sometimes and it did not other times?

A. We changed around every week. We picked the items every week.

Q. You were able to buy goods during the period you were cut off from District, with respect to Parke, Davis goods, were you not?

A. No, that is not correct, sir.

Q. Didn't they deliver some Parke, Davis goods to you during the period you were cut off?

[fol. 123] A. They did not, sir. They marked them "Out" and there was one example, I can tell you, the biggest item Parke, Davis makes, called ABDEC, an infant vitamin, they marked it "Out" and I said it was impossible, they could not be out of it.

Q. You were not able to get any Parke, Davis products from District during the period you were cut off?

A. Not only vitamin preparations——

Q. Any product?

A. But prescription items, also.

Q. You were not able to get any products?

A. We were not able to get any Parke, Davis items.

Q. And you say the same of Gilpin?

A. Gilpin, also, did not sell us any Parke, Davis merchandise.

Mr. Gosell: That is all, your Honor.

Mr. Kenney: A few more questions, sir.

The Court: Very well.

Redirect examination.

By Mr. Kenney:

Q. Mr. Rodman, when you buy your goods, do you take [fol. 124] title to them?

A. I think title is passed the moment it hits the carrier, or from some of the companies.

Q. You did not buy Parke, Davis goods on consignment, did you?

A. No, sir, there is no such thing ——

Q. You paid for them and you took title to them?

A. Yes, sir.

Q. Now ——

A. There is a return privilege that they honor.

Q. Yes.

The goods were yours?

A. Yes, sir.

Q. Mr. Rodman, you were cut off for a period from the beginning of July until roughly early September?

A. That is what I can say ——

Q. That is your recollection?

A. Yes.

Q. You bought only about $200 a month worth of Parke, Davis goods normally from District Wholesale, right?

A. That is right.

Q. Did you buy most of your Parke, Davis goods direct from Parke, Davis?

[fol. 125] A. Most of our volume items were bought from Parke, Davis direct.

Q. From Parke, Davis direct?

A. Yes.

Q. And still for $200 a month District was willing to lose your account, is that right?

A. Not for $200 a month, for the $75,000 a year, because we were going to lose the whole account. They were not just going to lose Parke, Davis merchandise.

Q. That is what I mean.

A. I offered them the entire account.

I said, "Phil, is this it? You mean, if I can't buy a prescription item from you which I need to fill a prescription, I am not going to buy anything from you, not only Parke, Davis merchandise but I am not going to buy the items that are sold only through wholesalers?"

Q. Now, is it possible, or do you recall whether during this period of time some order from either District or Gilpin may have slipped through to you from Parke, Davis materials?

A. That is always possible that an item may have come in from an order taker on the phone, when they called, that [fol. 126] an individual item may have been filled, but I know concretely that on several occasions when I, personally, called in and tried to follow it through to make sure that I was going to get the item, that I did not get any particular item that I was waiting for.

Q. And you were told by Mr. Levin that he could not sell Parke, Davis products to you?

A. I was told that, if it was the situation of our account or Parke, Davis, he has to go along with Parke, Davis in dollars and cents.

Mr. Kenney: That is all.

The Court: Are you through with the witness?

Mr. Gesell: Yes, sir.

The Court: You are excused.

(Witness excused.)

Mr. Kenney: I will call Mr. Strauss.

Thereupon Leon Strauss, was called as a witness by counsel for the Government and, having been duly sworn, was examined and testified as follows:

[fol. 127] Direct examination.

By Mr. Peters:

Q. Will you state your name, address and occupation to the Court?

A. My name is Leon Strauss.

I live at 7905 Rockden Avenue, Chevy Chase, Maryland.

My position is a pharmacist.

Q. Where did you have your pharmaceutical training?

A. University of Maryland.

Q. Do you operate any drugstores?

A. Yes, I do.

Q. What are those stores?

A. State Drugs, Incorporated and Green Belt Pharmacy.

Q. Where is the location of State Drugs?

A. It is at 1791 Pennsylvania Avenue, Northwest, in Washington.

Q. Do you own State Drugs?

A. It is a corporation. I am the president.

Q. How long have you operated State Drug, Mr. Strauss?

A. About nine and a half years.

Q. During that length of time have you purchased Parke, [fol. 128] Davis products?

A. I have.

Q. Where do you purchase your Parke, Davis products?

A. From Parke, Davis Company and also from the wholesalers.

Q. I direct your attention to the summer of 1950 and sometime prior to that.

What was your knowledge then of Parke, Davis resale, the Parke, Davis resale policy in connection with the Parke, Davis products?

A. Well, Parke, Davis as far as I was concerned, we could sell the Parke, Davis products for any price we wanted to; and we had signs on our window for years prior on a particular vitamin.

Q. How did you obtain the Parke, Davis products direct?

A. The salesmen would call on us and we would give him an order.

Q. Do you recall the name of that salesman in the summer of 1956?

A. Well, there was a salesman, Mr. Tancretti, who, I believe, you are referring to. There were several salesmen prior to Mr. Tancretti, who I would give orders to.

[fol. 129] Q. Directing your attention further to the summer of 1956, was there an occasion when Mr. Tancretti had a conversation relative to your policy of selling Parke, Davis products?

A. Yes, there was.

Q. Would you state —

A. I will.

Mr. Tancretti made his usual call, and I happened to be sitting at the soda fountain having a cup of coffee and he came over and sat down, and during the conversation at that time other stores were advertising Parke, Davis and other big manufacturers' vitamins —

Mr. Gesell: Just a minute, please, your Honor. The question is what was the conversation.

The Court: Correct.

By Mr. Peters:

Q. Mr. Strauss, confine your remarks to the best of your knowledge, a summary of it.

A. To the best of my knowledge, we were discussing price cutting. That was the basis of the conversation and during the course of the conversation I mentioned the fact that I had a MYADEC sign on my window, which I had for a number of years and Mr. Tancretti seemed a little bit sur-

[fol. 130] prised at it, as to my having the sign, and I men-

tioned the fact that I could not sell Parke, Davis merchandise at reduced prices.

I told him that that was impossible since other stores were actually advertising it in the paper.

He so informed me that that had ceased, and I said, "Well, if what you say is true, then I will cease, also."

But, I said, "I would like to have it proven first."

We went to the phone and called up this particular discount store in Maryland, and I asked him the price of three bottles of MYADEC; a person with a male voice and I was informed that it was $16.99 for three bottles, which is a reduced price.

I so informed Mr. Tancretti that under the circumstances I had to leave my sign on the window. And he informed me that he could not sell me and just left in a friendly manner.

Q. Mr. Strauss, what was the name of that drugstore?

A. It was Dart Drug. It was a discount store that had just come into existence.

[fol. 131] Q. What price were you advertising through the media of your sign on the window?

A. Seven sixty nine. We were selling it for seven sixty nine a hundred.

Q. And was this visit of Tancretti one of his usual visits?

A. It was a usual visit to the best of my recollection.

Q. Did he take an order?

A. No, he did not.

Q. Did he make any reference to the wholesalers?

A. No, I do not recall his stating that the wholesalers would not sell me.

Q. Did you have occasion, Mr. Strauss, to purchase any Parke, Davis products from the wholesaler subsequently thereto?

A. Yes, I did, subsequently. I had a prescription for a Parke, Davis item. My wholesaler called me in the morning as usual, and I requested the item, and I was informed that it could not be sold to me. I was not too concerned at the time because Gilpin called me later than District, and I figured, well, I will just pass it on to Gilpin and possibly get the item through Gilpin and avoid any trouble, you know.

[fol. 132] I ordered it through Gilpin and, of course, the item did not come in at all. The following day, when Mr. Phillips, District Wholesale order taker, called me, I in

formed him that I needed the item badly, and he suggested that I talk to Mr. Levin who was the vice president of District Wholesale.

I then spoke to Mr. Levin and told Mr. Levin I needed the item. He told me that he could not sell it to me.

Q. Did he say why he could not sell it?

A. Well, he did not go into detail on that.

Q. What was the name of this item?

A. It was chloromycetin with hydro cortisone. It was an eye drop.

Q. And you say Mr. Levin did not state the reason?

A. He told me he could not sell me any Parke, Davis merchandise.

Q. About how much business do you do with District?

A. Well, I do about $35,000 a year, I would say.

Q. Do you know how much of this is Parke, Davis products?

A. That would be impossible to guess.

Q. For how long a period did you try to get Parke, Davis [fol. 133] products from these wholesalers? Do you recall that?

A. How long?

Q. How long it was, for what length of time you were unable to get it?

A. For approximately two months.

Q. Coming back to Parke, Davis representatives, again, was there another occasion when Parke, Davis representatives approached you with respect to this matter?

A. Yes, to the best of my recollection two gentlemen from Parke, Davis called on me and just, of course, wanted to resolve the problem; very courteous, and nice, and I explained the situation to them that, of course, as long as the store was advertising in the paper, that I had to refuse to take my prices down, off the window, and the gentleman asked if I would be willing to take my prices down and of course sell it on the inside if the other so called discount stores ceased advertising in the paper, and I informed him that I would be very happy to; I would agree to that.

Approximately, I would say, a week went by —

Q. Just a moment.

[fol. 134] A. Yes, sir.

Q. Do you recall who these people were?

A. No, I do not. As I say, I would not recognize them at all. I know they were from Parke, Davis.

Q. Was there any definite commitment at the conclusion of the meeting?

A. Well, everything was verbal, and as far as any commitment goes, that was the way I understood the conversation, that if the other store would cease advertising in the paper, I would proceed to take my signs down, and that is the way it was left.

Q. Do you recall how much time elapsed between the visit of Tangretti and the meeting with these two gentlemen?

A. It would be strictly a guess. I would say about three weeks.

Q. Three weeks?

A. About three weeks.

Q. Subsequent to this second meeting was there a third conversation?

A. Yes, approximately a week later these same gentlemen who I had spoken to — as I say, there were two gentlemen, I do recall the one who I had my conversation with the most — came into the store, and I was very busy at the [fol. 135] time, and the conversation just — well, it was not even hardly a conversation; it was just an acknowledgment that everything was O.K. and that I accepted, and of course I assumed that meant that I could take my signs down and sell the vitamins at reduced prices on the inside, which I proceeded to do.

Q. Did you subsequently take your signs down?

A. Subsequently I did, on the window change, I took the signs down.

Q. For about how long a period did you keep the sign out of the window?

A. Well, we change our window approximately every two months and it was down for approximately four months minimum. It may have been longer, and then I put the signs back.

Q. What was the occasion of your putting the sign back up?

A. Vitamins were being advertised again at reduced prices, and we just put our signs back up again.

The Court: You mean Parke, Davis vitamins?

The Witness: Parke, Davis vitamins. That is correct.

[fol. 136] By Mr. Peters:

Q. Mr. Strauss, are you a member of the Drug Mart group?

A. Not at present.

Q. Were you during this time?

A. I was.

Q. How does that function?

What is the purpose of it?

A. It is a group of independent druggists who are organized for the purpose of advertising and buying. Of course, that was mostly an advertising group at the time.

Q. Well, what was the arrangement that you had with the Drug Mart group?

A. Well, each individual store was a dues paying member and we would have an advertising committee, appoint an advertising committee who would make up ads for the weekly newspaper, and they had sole jurisdiction. Whatever they wanted to advertise in the paper, they would advertise.

Q. Did you follow these was there an arrangement whereby you followed the prices as advertised in the

A. Oh, yes, as a member, we would follow the prices as advertised in the paper.

[fol. 137] Q. So that there was an obligation for you to see, by the newspaper advertising, what products were advertised at what prices?

A. That is right.

Q. And you would comply with that?

A. We were supposed to cut the paper out as a rule and follow the ad.

Q. And did you attend any meetings during the summer of 1956, of the Drug Mart group?

A. I attended a few meetings, whether it was during the summer, I do not recall.

Q. Do you recall any meetings in which the subject of the relationships between Parke, Davis and Drug Mart, group were

A. I did not attend that meeting if such a meeting existed.

Q. Calling your attention to your conversations with District, who was the party you first talked with at District?

A. Mr. Phillips, Mr. Warren Phillips.

Q. Do you know what his position was?

A. Yes, he informed me he could not sell me any Parke, Davis merchandise and that I would have to speak with Mr. Levin.

[fol. 138] Q. And you subsequently did?

A. And then I spoke with Mr. Levin the following day.

Mr. Peters: That is all, your Honor.

The Court: Cross examine.

Mr. Gesell: Yes, sir.

Cross-examination.

By Mr. Gesell:

Q. You are buying from Parke, Davis directly now, are you?

A. That is correct.

Q. You are buying from wholesalers, too, are you not?

A. That is correct.

Q. You are advertising at whatever prices you wish?

A. That is correct.

Q. In the window or elsewhere?

A. That is correct.

Mr. Gesell: That is all.

Mr. Peters: That is all I have.

The Court: You may step down.

(Witness excused.)

[fols. 139-141] Mr. Kenney: Your Honor, could I suggest that we have a short recess while I see if another couple of our witnesses have arrived?

The Court: All right. We will have a recess if you will let me know when you are ready.

Mr. Kenney: Fine, thank you.

(A brief recess was taken.)

[fol. 142] Mr. Kenney: I feel I must once again apologize to the Court. We have one more witness left. I had no idea we would move so rapidly today.

The Court: You are surprising me with the rapidity in which this case is moving.

Mr. Kenney: This part has been tried before and it does go fast. Tomorrow we will have plenty of witnesses.

The Court: You say you do have one more witness?

Mr. Kenney: Yes, we have one more.

The Court: Very well, put him on.

Thereupon RUTHERFORD B. DUNCAN, JR., called as a witness by counsel for the United States and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gardner:

Q. Will you please state your name and address for the Court?

A. Rutherford B. Duncan, Jr., 2724 Donna Circle, Falls Church, Virginia.

Q. And what is your occupation?

A. Wholesale drugs.

Q. What is the company that you work for?

A. The Henry B. Gilpin Company.

[fol. 143] Q. What position do you occupy there?

A. At this time or at the time——

Q. At the present time.

A. Manager.

Q. Directing your attention to the summer of 1956, what was your position at that time?

A. Assistant Manager.

Q. Will you describe the business of the Gilpin Company?

A. Distributors of drugs and drug sundries.

The Court: Wholesalers?

The Witness: Wholesalers.

The Court: Wholesalers to retailers?

The Witness: Yes.

By Mr. Gardner:

Q. What is the territory of the Gilpin Company, the sales territory of the Washington Division of the Gilpin Company?

A. The metropolitan Washington, and we go down as far as Fredericksburg, Charlottesville, Winchester, Virginia.

Q. Are Parke Davis Drug products included in your stock and trade?

A. Yes, sir.

Q. How are these products obtained? What are your sources, the Parke Davis products?

[fol. 144] A. The Parke Davis Company.

Q. Well, where are your orders sent primarily?

A. Baltimore.

Q. Are they obtained from any other place other than Baltimore?

A. No, sir.

Q. All are obtained from the Baltimore office?

A. That is where we send our orders, and I don't know if they ship some from some other place at times, I don't know.

Q. Do you have any written contract or franchise covering the obtaining of these products from Parke Davis Company?

A. None that I know of.

Q. Does the Parke Davis Company, to your knowledge, have a minimum resale policy for wholesalers?

A. A minimum resale?

Q. Yes. Is there any kind of a policy put out by the Parke Davis Company as to what price you should resell the products to the retailers?

A. Yes, sir.

Q. Has Parke Davis ever placed any restrictions on the Gilpin Wholesale Company in its sales and distribution of these Parke Davis products?

A. Yes, sir.

[fol. 145] Q. Now, directing your attention to the summer of 1956, was there an occasion where such restrictions were placed upon you at that time?

A. Yes, sir.

Q. When was that?

A. June or July; I don't know the exact date.

Q. How did these restrictions come to your attention?

A. Well, we had a visit from two members of the Parke Davis firm advising us that their policy was not to sell their products to anybody that was cutting the prices.

Q. Well, did they say anything about a policy of selling to wholesalers, any limitation on your selling to retailers?

The Court: I believe you had better reframe your question.

By Mr. Gardner:

Q. In other words, you testified they did not wish to sell their products to wholesalers who cut prices. Did they say anything about you selling to retailers who cut prices?

A. Yes, that was the statement; that we shouldn't sell to retailers at cut prices.

The Court: Whether or not they advertised?

The Witness: That wasn't mentioned.

[fol. 146] By Mr. Gardner:

Q. Who was present at this conversation?

A. Two Parke Davis men and myself.

Q. Just the three of you. Did they identify themselves to you in any way?

A. Only to say they were from Parke Davis.

The Court: Did you know who they were?

The Witness: No, sir.

By Mr. Gardner:

Q. Would you recognize them today? Would you be able to know them if you saw them?

A. I do not think I would.

Q. They identified themselves as Parke Davis representatives, though?

A. Yes.

Q. Was there any discussion as to where these orders originated from or this policy originated from?

A. No, all they said to me in the discussion was that if we had any questions we would have to get in touch with their main office.

Q. Did you make any reply to this statement?

A. I told them I didn't see how we could police the matter.

The Court: Would you speak a little louder, please?

[fol. 147] The Witness: Told them I didn't see how we could police this price cutting and that I did not give them any answer in any way, whether we would go along with them or not at that time.

By Mr. Gardner:

Q. Was anything said as to who the people were that were cutting prices?

A. No, sir, not at that time.

Q. Was there any discussion concerning any other wholesalers with respect to this policy?

A. They mentioned that they were visiting all wholesalers in this area on the same problem.

Q. To give them the same policy?

A. Yes.

Q. After these representatives left, what did you do then?

A. I took it up with Mr. Allen who was the vice-president and manager of our concern, and he advised me we should, on Dart Drug Company, which was the only one we knew that was cutting prices because of their ads, we should cut any large quantities, and not let them get any large quantities of any items.

Q. Did you do anything with respect to this conversation?

A. I informed our scanner to mark these items out or cut [fol. 148] them when they came through on that order.

Q. Who was your scanner?

A. Harold Braden.

Q. After this visit by the Parke Davis representatives were you at any time ever again visited by Parke Davis representatives?

A. Yes. Two or three weeks later they returned and said they had seen an invoice of ours in a store; didn't mention the name of the store; that we had shipped some Parke-Davis merchandise, and they wanted us to discontinue it.

Q. Why did they want you to discontinue sending merchandise to this store?

A. Because they were cutting prices.

The Court: Was that the Dart Company?

The Witness: They did not say which store, Your Honor.

By Mr. Gardner:

Q. Were these the same two men who visited you previously?

A. I don't think so; I am not positive.

Q. But they identified themselves as Parke Davis representatives?

A. Yes.

Q. What did you say in reply to this?

[fol. 149] A. I told them we would try to cooperate with them.

Q. After these men departed, what action or what steps did you take?

A. I spoke to Mr. Allen again and we decided to stop selling Dart entirely and instructed Harold Braden to do that.

Q. Cut Dart off competely?

A. Yes.

Q. After this second visit by the Parke Davis representatives, did you have any further discussions with Mr. Allen about this matter?

A. Yes, a short time later, two or three weeks later, he called me on the phone and said he had a call from the Parke Davis people giving him a list of the stores that did not—that they did not want us to sell Parke Davis merchandise to. As I recall, that was Dart, McReynolds, State, Babbitt and Whelan, I believe.

Q. Did he tell you the name of the person calling him?

A. No, sir.

Q. But he said it was someone from Parke Davis?

A. Yes, sir.

Q. Did you take any action after Mr. Allen told you of this telephone call?

[fol. 150] A. I instructed Mr. Braden to stop selling to these accounts, yes.

Q. All of those you just listed?

A. Yes.

Mr. Gardner: Will you please mark these for identification? I think the next numbers are 11 and 12.

(The documents referred to were marked for identification as Government's Exhibits Nos. 11 and 12.)

By Mr. Gardner:

Q. Mr. Duncan, I hand you what has been marked as Government's Exhibit 11 for identification. Can you identify this?

A. Yes, that is a Henry B. Gilpin Company work order form from orders from Dart Drug Company.

Q. What period do these orders cover? I mean by months, if you can tell from the orders.

A. They cover July, August and September, I believe, of 1956.

Q. Did you notice whether there were any Parke Davis items in this order?

A. Yes, there are some Parke Davis items.

The Court: Are they all Parke Davis?

The Witness: No, sir.

The Court: Just some?

The Witness: Just some.

[fol. 151] The Court: Have you seen this?

Mr. Gesell: Yes, I am familiar with that exhibit.

The Court: It has not been offered, yet.

Mr. Gardner: I would like to move Government's Exhibit No. 11, for identification, into evidence at this time.

Mr. Gesell: No objection.

The Court: It may be so marked.

(The document heretofore marked for identification as Government Exhibit No. 11 was received in evidence.)

By Mr. Gardner:

Q. I show you what has been marked as Government's Exhibit No. 12 for identification. Can you identify this, please, sir?

A. Yes, that is a Henry B. Gilpin Company work order form on State Drug Company.

Q. Will you tell me what months that covers and the year?

A. These are for July and August of 1956.

Q. Are there any Parke Davis items among those orders?

A. Yes, sir.

Mr. Gardner: I would like to move Government's Exhibit No. 12 for identification into evidence.

[fol. 152] Mr. Gesell: No objection.

The Court: Without objection they may be marked.

(The document heretofore marked for identification as Government Exhibit No. 12 was received in evidence.)

By Mr. Gardner:

Q. Mr. Duncan, after you instructed your scanner, Mr. Braden, not to fill these orders from the stores that you have listed, Dart, Whelan, McReynolds, State, do you know whether these stores submitted further orders to you?

The Court: For Parke Davis products?

Mr. Gardner: Yes, for Parke Davis products.

The Court: If you know, say so.

The Witness: I am sure they did. I could not say positively except by the order forms which show they did.

By Mr. Gardner:

Q. You saw the exhibits covering the months following that time?

A. That's right.

Q. Were these orders filled?

A. No. Some of them were filled and some weren't.

Q. Were the Parke Davis items filled on those orders?

A. Not all of them.

The Court: Some of them were?

[fol. 153] By Mr. Gardner:

Q. Were any of them filled?

A. I think I saw one just now that was filled.

(Mr. Gardner hands Exhibits 11 and 12 to the witness.)

A. I am not sure if this was filled or not. It is not initialed but it is not marked out, either.

Q. That is in July?

A. Yes. That is the only one I see.

Q. Do you know, of your own knowledge, that when some of these Parke Davis orders were not filled, whether or not Parke Davis items were in the inventory of your wholesale company? Did you actually have those products on hand at that time, in some cases?

A. I am sure we did.

Q. Did there come a time when you again began to resume selling Parke Davis items to these four retailers that were mentioned previously?

A. Yes.

Q. How did this come about?

A. Mr. Allen received a call from Parke Davis telling him that it was all right to go ahead and sell these stores.

Q. Do you know when that was, approximately?

A. I think it was about three weeks after the original [fol. 154] call giving him the list of stores not to sell to.

Q. Approximately how long a period elapsed from the visit of the first Parke Davis representatives until you again commenced selling to these four retailers?

A. I would say about eight to ten weeks.

Q. Mr. Duncan, on this Plaintiff's Exhibit No. 12, where you are unsure of whether or not this order for a Parke Davis product was filled or not, in case that order had been filled, would that have been contrary to the instructions?

A. Yes.

Q. It would be, perhaps, a mistake, then?

A. That's right.

Mr. Gardner: Thank you. That is all.

Cross-examination.

By Mr. Gesell:

Q. Mr. Duncan, you understood, did you not, that if you continued to sell to these price-cutting retailers contrary to the instructions or suggestion of Parke Davis that you would be cut off?

A. I wasn't told that, but I assumed it from what I had heard.

Q. And it was on that basis that you acted?

A. Yes.

[fol. 155] Q. As far as the scope of your operation is concerned, do you sell in Richmond?

A. No, sir.

Q. Parke Davis, for many years, has had a policy that has made it clear that wholesalers are expected to maintain a specified minimum price in selling to retailers, has it not?

A. Yes.

Q. How many years have you been with the Henry B. Gilpin Company?

A. Twenty-seven years.

Q. As far as you recall that policy has been in effect that entire time?

A. Yes.

Q. And Gilpin has always observed that policy in its dealings with Parke Davis, has it not?

A. Yes.

Q. It is a fact, isn't it, that Parke Davis representatives do not regularly call on the wholesalers under the customs of the trade, the way they call on retailers?

A. Right, sir.

Q. So that when these representatives came, whoever they were, you didn't know them because you hadn't usually been meeting Parke Davis representatives in the course of your business?

[fol. 156] A. Well, we had met some but it was not the regular one that normally called on us.

Q. And you don't have any recollection of the man's name?

A. No, sir, I do not.

Mr. Gesell: Would you mark this as Defendant's Exhibit No. 2 for identification?

(A letter dated April 4, 1958 was marked for identification as Defendant's Exhibit No. 2.)

By Mr. Gesell:

Q. I show you a document of two pages, a letter on the stationary of the Henry B. Gilpin Company addressed to Mr. Dripp, dated April 4, 1958, with a schedule attached purporting to be signed by you, marked Defendant's Exhibit No. 2 for identification. Do you recognize that as a letter prepared by you?

A. Yes, sir.

Q. Was the schedule attached prepared under your direction and your supervision from the records of the company?

A. Yes, sir.

Q. And is it true and correct to the best of your knowledge and belief?

A. Yes, sir.

Mr. Gesell: I have no further questions.

[fols. 157-158] The Court: Have you seen that, Mr. Kenney?

Mr. Kenney: I don't believe so.

Redirect examination.

By Mr. Gardner:

Q. Just two more questions, Mr. Duncan.

In this policy that counsel for the defendant referred to, the Parke Davis policy that you have been familiar with for years, there is nothing in that policy about selling to price-cutting retailers, and nothing that prevents you from doing so, is there?

A. No.

Q. Do you consider that the Parke, Davis Company is your competitor in sales to retailers?

Mr. Gesell: I object to that. That calls for a conclusion.

The Court: Sustained.

By Mr. Gardner:

Q. I would ask, then, Mr. Duncan, if it is possible for a retailer to buy from—from your own personal knowledge is it possible for a retailer to buy some Parke Davis products at lower prices from Parke Davis than they can from your wholesale house?

A. I believe that is true.

Mr. Gardner: That is all. Thank you.

Mr. Gesell: No further questions.

[fols. 159-160] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Transcript of Proceedings of June 12, 1958

Washington, D. C.,
Thursday, June 12, 1958

The above entitled matter came on for further trial before Judge Joseph R. Jackson, at 10 a.m.

APPEARANCES:

For the United States: Mr. Edward R. Kenney, Mr. Herbert F. Peters, Mr. Marshall C. Gardner.

For the Defendant: Mr. Gerhard A. Gesell, Mr. David B. Isbell.

[fol. 161] PROCEEDINGS

Mr. Kenney: Good morning, sir. May I proceed?
The Court: Mr. Kenney.
Mr. Kenney: I call Mr. James Allen.

Thereupon JAMES ALLEN, a witness called by counsel for the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

Q. Your name is James Allen?
A. Yes, sir.
Q. Would you please give the court your address, your residence address?
A. 3229 Livingston Street, Northwest, Washington.
Q. What is your occupation, sir?
A. President of the Henry B. Gilpin Company.
Q. What is the business of the Henry B. Gilpin Company?
A. We are wholesale druggists.

Q. Do you serve the Washington, D.C. area.

A. Yes, sir.

[fol. 162] Q. You also serve the State of Virginia from another branch?

A. Yes, sir.

Q. Could you tell us what area your operations from the Washington, D.C. branch cover?

A. The metropolitan area of Washington, about two million population.

Q. The Gilpin Company is a rather old wholesaler in this area, is it not, sir?

A. Yes, sir, we are over 100 years old.

Q. Does Gilpin handle the products of the Parke, Davis Company?

A. Yes, sir.

Q. Has it handled these products for a number of years?

A. Yes, sir.

Q. How long have you been associated with Gilpin, Mr. Allen?

A. Eighteen years.

Q. Have they handled these products ever since you have been associated with that company?

A. Yes, sir.

Q. Do you regard Parke-Davis as a competitor of Gilpin?

[fol. 163] Mr. Gesell: I object to that. I think he ought to state facts not conclusions.

The Court: I will sustain that objection.

He can state the facts, to get the information.

Mr. Kenney: Your Honor, certainly the man knows whether he regards this company as a competitor, or not.

The Court: Why don't you ask him how they sell and then he can determine from the competition list.

By Mr. Kenney:

Q. Mr. Allen, Gilpin is a wholesaler and sells its products to retailers, does it not?

A. Yes, sir.

Q. Does Parke, Davis sell to these same retailers?

A. Yes, sir.

Q. And to your knowledge are their sales in competition with yours?

A. At times, sir.

Q. Are you familiar with the so called Wholesale Drug Policy of the Parke, Davis Company?

A. Yes, sir.

Mr. Kenney: Would you please mark this Government's Exhibit for identification No. 13?

The Clerk: Government's Exhibit 13.

[fol. 164] (Parke, Davis Wholesale Drug Policy Statement was marked Government's Exhibit 13 for identification.)

By Mr. Kenney:

Q. Mr. Allen, I am going to show you government exhibit 13 for identification and ask you whether you can recognize this as a statement of the Wholesale Drug Policy of the Parke, Davis Company?

A. Yes, sir, I do.

Mr. Kenney: I offer Government's Exhibit for identification No. 13 into evidence.

Mr. Gesell: No objection.

The Court: It may be received.

(Parke, Davis Wholesale Drug Policy Statement previously identified Government Exhibit No. 13 was received in evidence.)

By Mr. Kenney:

Q. Mr. Allen, I will ask you if you will please read aloud for the record the statement on the wholesale policy of Parke, Davis?

A. "Wholesale Drug Trade Sales and Distribution Policy.

"It is the continuing policy of Parke, Davis and Company in dealing with wholesalers to sell its products to wholesalers who observe the net price selling schedule in this [fol. 165] Parke, Davis and Company wholesale drug trade billers' price list and supplements, and who confine their distribution of Parke-Davis products, whether prescription legend or non-prescription legend, to customers authorized by law to fill or dispense prescriptions."

Q. Now, in line with this policy, Mr. Allen, does Parke-Davis give you the prices for which you are to sell their products?

A. The wholesale selling price is established in their price list and we follow it.

Q. So they sell you with these prices and you follow them?

A. Yes, sir.

Q. Do you also observe the policy of selling only to so-called RX outlets?

A. Yes, sir. We observe that policy and try to practice it, and we are not completely efficient in doing it, but we try.

Q. Now, Mr. Allen, is this written policy here the only wholesale policy of Parke-Davis with which you are acquainted?

A. I would say, yes, sir.

Q. Have you ever heard that Parke-Davis has a policy whereby Gilpin as a wholesaler can not sell to price cutting [fol. 166] retailers?

A. It has not been spelled out in writing to us that we could not do that.

Q. Prior to 1956 in the summer, had you ever heard of this policy?

A. I can't specify when I had ever heard of that policy. I would say by implications traditionally we are aware of that kind of thinking, but I am not sure we have ever had it spelled out to us.

Q. You know, do you not, sir, that the District of Columbia is a non-Fair-Trade area?

A. Yes, sir.

Q. Mr. Allen, directing your attention to the summer of 1956, who was your assistant at the Gilpin Company?

A. Mr. R. B. Duncan.

Q. During the summer, and we will try to pin-point the date later, did you have occasion to converse with Mr. Duncan about a visit he had had from some Parke-Davis representatives?

A. Yes, sir.

Q. Could you tell us approximately when that was?

A. I think it was in July. I did not look that up and I do [fol. 167] not remember the exact month. It was probably July.

Q. Your best recollection is July?

A. I think so.

Q. Could you tell us now what was said by you and Mr. Duncan during this conversation?

A. Mr. Duncan stated to me that he had had a visit from a representative, or two representative I believe, from Parke-Davis, and they indicated to him that they wished us not to distribute their goods to price cutting retailers.

Q. Did Mr. Duncan name these price-cutting retailers to you at the time?

A. He indicated to me that they did not name them to him at that time.

Q. And what did you tell Mr. Duncan?

A. I told him that we would have to try to go along with their wishes as best we could.

Q. And did you comply with their wishes to the best of your ability at that time?

A. Yes.

Q. Subsequent to this conversation with Duncan, did you, yourself, have occasion to converse with any representative of Parke, Davis?

[fol. 168] A. Yes, sir. Sometime following that I had a telephone call from the Parke-Davis representative.

Q. Could you tell us approximately how long after this time this call was received by you?

A. I think maybe about two weeks or so.

Q. Do you know the name of the Parke-Davis representative?

A. Yes, sir, I think it was Mr. Dripps.

Q. And did Mr. Dripps call you; is that right, sir?

A. Yes, sir.

Q. And what did Mr. Dripps say to you during this telephone conversation?

A. He indicated — he named two or three stores that were price-cutting their goods and indicated that he would like for us to hold back the sales to those stores.

Q. Do you remember the names of the stores that he named?

A. Yes, sir. I think State Pharmacy was one, and McReynolds Pharmacy, and Dart Drug, I think and ——

Q. Did he name Standard, do you recall?

A. I recall that he named a store that was a chain store and it might have been Standard but I really had another

chain in my mind, as I remembered it, but since then I have [fol. 169] been under the impression it might have been Standard.

Q. What others did he mention? Did he mention Babbitt?

A. No, I do not believe he did.

Q. What did you tell Mr. Dripps at this time, sir?

A. That we would give this serious consideration and try to cooperate the best we could.

Q. And what action did you take as regards your company's employees after this conversation?

A. I advised Mr. Duncan of this and told him to try to stop the distribution of heavy quantities to these stores.

Q. You left it in Mr. Duncan's hands, is that correct?

A. Yes, sir.

Q. Do you know of your own knowledge whether Mr. Duncan complied with your directions?

A. Yes, sir, I know that he did.

Q. Now, turning back to your conversation with Mr. Duncan prior to the call from Mr. Dripps, was there any mention of other wholesalers in this conversation?

A. Between Mr. Duncan and I?

[fol. 170] Q. Yes.

A. We were wondering ourselves whether or not other distributors were as serious about this, or trying as we were, and our salesmen seemed to indicate that they were.

Q. You learned that they were; is that right, sir?

A. Yes.

Q. Now, subsequent to the time that you gave the instructions to Mr. Duncan, did you have a further conversation with Mr. Dripps?

A. Yes, sir, later. I think it was him that called me; advised that he thought these stores had discontinued this price cutting and that we could probably supply them all right.

Q. And did you thereafter start supplying these stores again when they put in orders?

A. Yes, sir.

Q. Now, Mr. Allen, do you have to take any special precautions in assuring that you comply with the Parke-Davis policy on not selling to non-drug outlets?

A. Yes, sir. You are referring to non-prescription legend drugs, I know.

Q. Yes, sir.

[fol. 171] A. And we do make an effort to control that distribution.

Q. If it were not for this policy, are there any Parke-Davis articles that you would sell to these outlets?

A. Yes, sir.

Q. Could you name some of them?

A. Necco Soap, probably, or Creosote dip, something like that.

The Court: What is Creosote dip, a sheep dip?

The Witness: It is a sheep dip. We probably do sell that item to non-registered stores sometimes.

Mr. Kenney: That is all.

The Court: Cross examine.

Cross-examination.

By Mr. Gesell:

Q. Mr. Allen, how long a period of time did you say you had been with Giplin, yourself?

A. Eighteen years.

Q. During that entire time is it not correct that Gilpin has observed Parke-Davis policies both with respect to non-drug outlets and with respect to wholesale prices?

A. Yes, sir, tried to.

Q. During that entire period?

[fol. 172] A. That has been our policy to do so during that period.

Q. And have you known that it has been Parke-Davis' policy during that entire period?

A. Yes, sir.

Q. Now, when Mr. Dripps talked to you on the occasion you have testified about, the first occasion that he talked to you, he did not ask you to enter into any agreement with him, did he?

A. No, sir.

Q. And you did not make any agreement with him, did you?

A. No, sir, I did not.

Q. You just thanked him for telling you about the names of the companies?

A. Well, there was some conversation to that effect.

Q. Have you ever had any discussions with anyone in Parke Davis on the subject of non-drug outlets?

A. Not in recent years, personally.

Q. Let me find out a bit more about your business as a wholesaler.

As I understand it, you and the other wholesalers in the District of Columbia handle not only Parke, Davis items, but [fol. 173] they handle the items of a large number of manufacturers of drug items, do they not?

A. Yes, sir; about 2,000.

Q. About 2,000 different drug items?

A. Different firms.

Q. Different firms?

A. Yes.

Q. And about how many items would you say in all?

A. About 178,000.

Q. So that Parke-Davis is just one supplier of one of the lines that you and the other wholesalers handle?

A. Yes, sir.

Mr. Kenney: Now, your Honor, I object to this question. It is immaterial and irrelevant. It has no connection with this case.

The Court: Overruled.

By Mr. Gesell:

Q. As I understand it, also, Mr. Allen, there are some drug manufacturers who sell direct to the retail trade and through wholesalers, and there are some that sell only through wholesalers?

A. Yes, sir.

Q. Is that not so?

A. Yes, sir.

[fol. 174] Q. And there are some who do not sell through wholesalers at all but sell entirely direct?

A. Well, I don't think of — in the pharmaceutical field that is rare. I cannot think of any.

Q. Very few of those?

A. Yes, sir.

Q. You said that you considered that at times you were in competition with Parke-Davis?

A. Yes, sir.

Q. Am I not correct in understanding, or is it not the fact —let me put it this way:

Is it not the fact that retail stores generally are able to acquire their goods if they buy in any quantity cheaper by buying direct from Parke, Davis than they are from buying from you?

A. On many items in the catalog they can buy cheaper by direct in quantity.

Q. And the service you provide is a service which enables any drugstore on short notice to get any item from you that it may need and you specialize in service and in prompt delivery, and in filling the retailers' line whenever he is short of any particular product and needs it in a hurry?

A. Yes, we supply him with about 80 per cent of his total [fol. 175] requirements as a distributor and supply house.

Q. Is that so as to Parke-Davis products?

A. I doubt it in the Parke-Davis line.

Q. In Parke-Davis, the amount of wholesale business is relatively small because of Parke-Davis' direct sales to the drugstores, the drug trade?

A. Yes, that is right.

Q. And when you said that at times you thought you were in competition, there are some kinds of business that you get that Parke, Davis would not get and some types of business they get that you would not get, is not that right?

A. I think that is reasonable.

Q. Now, at the present time I understand that you are selling Dart Drug, State, McReynolds and these other firms you have mentioned in your direct testimony?

A. Yes, sir, we are selling them all they will buy.

Q. And you have been selling them that way ever since Mr. Dripps called you the second time; is not that right?

A. Yes, sir.

Q. And about when was that?

[fol. 176] A. I could give you the year.

Q. It was in 1956?

A. Yes, sir.

Maybe it was July or August of 1956.

Q. July or August of 1956?

A. Yes, sir.

Q. And ever since then you have been selling them?
A. Yes, sir.

Mr. Gesell: That is all, your Honor.
Mr. Kenney: I have a few more questions.

Redirect examination.

By Mr. Kenney:

Q. Mr. Allen, referring again to this first telephone conversation you had with Mr. Dripps. If it had not been for this call, would you have stopped selling to these drugstores that you named?
A. Probably not. Probably not.
Q. You always had sold them, had you not, sir?
A. One of them we had always sold. Two of them were not very big customers with us anyway.
Q. Which one had you always sold?
A. Dart Drug we had sold.
Q. And if it had not been for this call, you would not have [fol. 177] stopped your sales to Dart Drug, would you?
A. That is right. No, sir.
Q. To your knowledge, do you know whether Dart Drug was advertising the products of other manufacturers than Parke, Davis at cut prices?
A. Yes, sir, I know that they were.
Q. Were you approached by any other manufacturer and asked to stop selling them?
A. No, sir, I do not believe I have been approached by others.
Q. You were not allowed to give quantity discounts to your retail accounts on Parke-Davis products, were you?
A. No, sir.
Q. Parke, Davis does give them, does it not?
A. Yes, sir.
Q. And so there is price competition between your company and Parke, Davis on these items?
A. Yes, sir.
Q. And I believe you testified that normally you sold the retailers in this area 80 per cent of their requirements of manufacturers' products?
[fol. 178] A. That is right; their total supply.

Q. But your percentage is far less in the case of Parke-Davis, is it not?

A. Yes, sir.

Mr. Kenney: That is all.

The Court: Any recross-examination?

Mr. Gesell, are you through with the witness?

Mr. Gesell: Just one question.

Recross-examination.

By Mr. Gesell:

Q. With respect to Dart, you cut Dart off after talking to Mr. Dripps, only on Parke Davis products, isn't that right? You sold him everything else?

A. Yes, sir.

Mr. Gesell: That is all.

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Kenney: Mr. Braden.

Thereupon HAROLD L. BRADEN, a witness, was called by counsel for the Government, and, having been duly sworn, [fol. 179] was examined and testified as follows:

Direct examination.

By Mr. Gardner:

Q. Will you please state your name and address for the Court, please.

A. Harold L. Braden, 8003 Eastern Avenue, Silver Spring, Maryland.

Q. What is your present occupation?

A. Outside salesman for the Henry B. Gilpin Company.

Q. Directing your attention to the summer of 1956, what capacity were you then employed in by the Gilpin Company?

A. I was known as a scanner.

Q. Please explain the duties of a scanner to the Court.

A. Well, a scanner is where, after the orders have been written by the salesmen or the telephone sales, the procedure of the orders start at the scanner's desk, which we have each manufacturer or merchandise in certain sections which have a number, and my job was to put the number on the order to show what section it was in, and the order picker [fol. 180] would automatically see if it was in a section.

Q. In other words, to expedite the filling of the orders?

A. Yes.

Q. Did the Gilpin Company sell Parke-Davis products during this period?

A. Yes.

Q. Directing your attention again to the summer of 1956 did you ever receive any instructions from anyone at Gilpin Company as far as restrictions to be placed on handling or distribution of these Parke-Davis products?

A. Yes, I did.

Q. Well, when was that, and the month, approximately, in 1956?

A. Well, I think maybe it might be July or August. I am not positive. July or August, I would say.

Q. Who issued these instructions?

A. Mr. Duncan, which was — he was the assistant manager at the time. He is manager now.

Q. Will you state the substance of the orders he gave you? [fol. 181] A. He asked me not to send any quantities of Parke, Davis merchandise to Dart Drug. They bought too heavy; that to cut them down to a normal amount, and not send a tremendous amount to them.

Q. In other words, to reduce the quantity; is that right?

A. Yes.

Q. Did you do as you were instructed?

A. Yes, I did.

Q. Well, after this first discussion with Mr. Duncan, did you have occasion to have another discussion with him concerning this matter?

A. Yes, he instructed me to have four other stores I believe — three other stores I believe it was — Dart, McRey rolds, State and the Whelan Drug Stores.

Q. What did you tell him or what did he tell you with respect to these stores?

A. Well, not to sell them at all; to mark out the Parke Davis merchandise which they were ordering through our house.

Q. Mr. Braden, I hand you what has been marked as Government exhibit 11 and ask if you can identify this please, sir.

[fol. 182] A. Yes, that is one of our order forms for Dart Drug at 1801 Columbia Road. Regular order form.

Q. Forms in which they requested orders?

A. Orders to be written on, yes.

Q. Are there any Parke-Davis products requested on those forms?

A. Yes, they are.

Q. I hand you Government's exhibit No. 12. Can you identify that?

A. Yes, sir, that is State Drug 1701 Pennsylvania Avenue, one of our regular forms on which the orders are written.

Q. Similar orders?

A. Yes, sir.

Q. Are Parke-Davis items included in those requests?

A. Yes.

Q. Were these orders received by you in your capacity as a scanner?

A. Yes, sir.

Q. What action did you take when you received these orders?

A. I would mark the Parke Davis items on each order of those particular stores with a "T" which means "Temporarily out." It is one of our codes.

Q. At the time that you put this "T" on there, indicating [fol. 183] "Temporarily Out," Did you know of your own knowledge whether or not actually some of these products were in the inventory at your wholesale house?

A. Yes, I think they were.

Q. Well, why did you mark them out when they were available?

A. Because I was instructed by Mr. Duncan.

Mr. Gardner: No further questions on direct examination, your Honor.

Mr. Gesell: No questions, your Honor.

The Court: You are excused.

(Witness left the stand.)

Mr. Kenney: Mr. Davis.

Thereupon Ben Davis, was called as a witness by counsel for the Government and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

Q. Your name is Ben A. Davis?

A. Yes, sir.

Q. What is your address, Mr. Davis?

A. 8804 Maywood Avenue, Silver Spring, Maryland.

[fol. 184] Q. What is your occupation?

A. Now, I am a regional sales manager for the Quick Check Company of Philadelphia.

Q. Directing your attention to the summer of 1956 what was your occupation at that time?

A. I was coordinator for the Drug Mart, Incorporated.

Q. And what was the Drug Mart, Incorporated?

A. It was a group of independent pharmacies who get together to advertise and buy cooperatively.

Q. A group of independently owned drug stores?

A. Drugstores, yes, I am sorry.

Q. Can you tell us, in 1956, approximately how many independent drugstores comprised this group?

A. To the best of my knowledge, about 30.

Q. And what were your duties as coordinator, Mr. Davis?

A. Well, I helped with the buying, I helped with the advertising, I saw that the stores made their displays of the items that were advertised. It was a general all around manager, I suppose. I had no one specific duty.

Q. But you were more or less the manager?

A. Yes.

Q. Were there other paid employees of this group at that time?

A. No.

[fol. 185] Q. You were the only one?

A. Yes, sir.

Q. Now, I want to direct your attention again to the summer of 1956 and ask you if, at this particular time, you were acquainted with a Parke Davis salesman by the name of Heritage?

A. Yes.

Q. Had you known Mr. Heritage very long?

A. Well, off and on for quite a number of years, yes, sir.

Q. Now, did you have occasion during the summer of 1956 to have a conversation with Mr. Heritage in one of your stores?

A. Yes.

Q. Can you tell us approximately when this was?

A. No. I know it was in the summer but I am not positive exactly as to what date it was.

Q. Can you tell us what was said during this conversation by you and by Mr. Heritage?

A. Well, I walked into the store and Mr. Heritage was there, and we started to — well, he started a conversation as to Drug Mart advertising P D products below the Fair Trade price, at cut prices, and he asked me — said at the time that Peoples was going to stop cutting prices, or had stopped cutting prices — I do not remember exactly what he did say [fol. 186] and asked me whether we would go along.

He also said at the time that, if we did not stop cutting the price, that P D would find a way to cut our stores off from direct buying, or from buying the P D products.

I told him at the time that I would go along with him; that, as long as Peoples went along, I would go along.

We mentioned Dart, and he said he did not know what Dart was going to do. I said, well, Dart does not worry us too much, we sort of ride along with what Peoples do in their ads.

Q. Well, after this conversation, did you take any action as regards the advertising of the Drug Mart group which you represented?

A. Well, during the conversation I told him I still had one ad that had to run, that was in the process of being put in the paper the following week, and after the conversation I contacted Mr. Shulman of Hillcrest Heights Pharmacy who

at that time was the president of Drug Mart, and talked to him about it, and he was of the same opinion that I was, that if Peoples stopped cutting, we would.

Q. Well, did you stop the advertising for your group?

A. After the ad that I could not pull, ran, yes.

[fol. 187] To the best of my knowledge, no other ads were run.

Q. Do you know how long this advertising stoppage lasted?

A. Well, to the best of my knowledge, until I left Drug Mart, until I quit working for Drug Mart, which was in April of 1957.

Q. Now, in addition to the advertising, did I understand you to say that the Drug Mart group would not cut the prices?

A. No. I had nothing to do with what the individual stores did. As far as their price structure, I had nothing to do with this, but as far as the advertising in the paper, this was what I was referring to.

Q. And they did stop this advertising?

A. To the best of my knowledge, yes.

Mr. Kenney: I pass the witness.

The Court: Cross examine.

Cross-examination.

By Mr. Gesell:

Q. Each of the Drug Mart stores under the organization of the cooperative was free to go ahead and charge what it wanted in its store?

A. Oh, yes.

Q. And was free to advertise or not advertise in its [fol. 188] windows as it chose?

A. As an independent store; yes, sir.

Q. Where were you when you had this conversation? What store were you in?

A. K & C Drug at Silver Hill Road and District Heights, District Heights, Maryland.

Q. Mr. Heritage mentioned to you Fair Trade prices, did he not?

A. Yes.

Q. And Drug Mart's ads in the Washington papers were advertising cut prices in Maryland, were they not?

A. That is right.

Q. You are aware, are you not, that Peoples advertised these cut prices well before April, 1957?

A. Oh, yes, of course. April of 1957 was the date I left Drug Mart.

Q. But well before that Peoples was again advertising

A. No, this I do not remember. I could not say.

Q. You do not know whether they did or whether they did not?

A. Are you referring to the time after I spoke with Mr. Heritage?

Q. Yes.

A. I do not remember. I cannot recall whether they did [fol. 189] again or not.

Q. You could not remember, do you, whether or not Drug Mart advertised again in that period?

A. Not to the best of my knowledge.

Now, if they did, it was inadvertent. Not to the best of my knowledge, anyway.

Q. You do not recall an advertisement in November of 1956?

A. No, I do not. If I saw it, I might; but I do not remember.

Mr. Gesell: No other questions.

Mr. Kenney: A few more questions, your Honor.

Redirect examination.

By Mr. Kenney:

Q. Mr. Davis, as I understand your testimony, the Drug Mart group advertised as a group. Is not that correct?

A. That is right.

Q. The individual stores did not advertise in the newspapers to your knowledge?

A. Not to my knowledge, they did not, no. Of course, this is something that the Drug Mart, itself, could not control.

Q. Now, a number of these Drug Mart stores are located in the District of Columbia?

[fol. 190] A. The majority of them.

Q. And they were advertising prior to your conversation with Mr. Heritage at cut prices in the District of Columbia?

A. Right.

Q. And, after your conversation they ceased this advertising?

A. That is right.

Q. Is that correct, sir?

A. Yes, to the best of my knowledge.

Mr. Kenney: That is all.

Mr. Gesell: No questions.

The Court: The witness is excused.

(Witness left the stand.)

Mr. Kenney: Mr. Gilbert Rosenthal.

Thereupon GILBERT ROSENTHAL, a witness called by counsel for the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Peters:

Q. Will you state your name, address and occupation to the Court, please?

A. Gilbert Rosenthal, 4417 West Franklin Street, Richmond, Virginia. I am merchandising manager of Standard [fol. 191] Drug Company.

Q. Where are the Standard Drugstores located?

A. We have five stores located in the District of Columbia, three in Richmond and four in other small towns in Virginia.

Q. Where is the headquarters?

A. Richmond.

Q. What facilities do you have at your headquarters?

A. We operate out of our general offices all of our accounting in our central warehouse. All of our buying is done in Richmond.

Q. Do you purchase Parke-Davis products?

A. Do I, myself?

Q. Does Standard Drug?

A. The company does purchase products of Parke Davis.

Q. How do you purchase these products?

A. We purchase the majority of them directly from Parke, Davis Company. Some from wholesalers.

Q. How do you purchase these products direct from Parke-Davis?

A. Just in the normal routine of buying. We have stock order cards, and the card is run approximately every two weeks, and each item from Parke, Davis is listed on this card and the card is sent to our typist and she types the [fol. 192] orders and they are mailed in.

The majority of times they are mailed in. Sometimes the Parke, Davis representative stops by and picks up the orders.

Q. Mr. Rosenthal, I direct your attention to the summer of 1956, and I will ask you whether or not your practices with respect to Parke Davis products was questioned by Parke, Davis?

A. Yes, it was.

Q. How did this come about, sir?

A. Mr. Steere, our pharmaceutical buyer, our drug buyer at the time, told me that there were three representatives there that wanted to see me.

One of the gentlemen named was the local representative and I remember his name. His name was Kamm.

He called on us several times before and I remembered him. I believe Mr. Cummings was one of the other gentlemen, and I do not remember the other name at all. I had a discussion, Mr. Steere and myself, for quite a period of time, and they informed me that the prices on Parke Davis products in the area were being cut, so much so that they thought that they were being hurt by the price cutting, and that they wanted us to discontinue price cutting on Parke Davis [fol. 193] products, and they felt it so strongly that if we did not discontinue cutting on Parke Davis products, they would discontinue selling us.

In addition to which not only would they discontinue selling us, but they would do everything they could to see that we did not get Parke Davis products.

In other words, they would cut the wholesalers off, or instruct the wholesalers to cut us off from buying.

Q. Did you make any commitment with these representatives at that time?

A. No; I did not. I did not give them an answer at all.

Q. To pinpoint this a little more closely, Mr. Rosenthal, do you recall just about when this happened?

A. I cannot remember the date, it was sometime in the late summer of 1956, though.

Q. Where did this occur?

A. In our buying office.

Q. In Richmond?

A. Right in our buying office in Richmond.

Q. What happened subsequent to this visit?

A. Well, we did nothing. We did not change any prices. I gave no instructions to our supervisor, who runs our Washington stores, Mr. Skelly, and we continued our normal [fol. 194] course, and I believe about two weeks later, I got a call from the Baltimore office of Parke Davis, and I believe Mr. Powers was on the phone at that time, Mr. Eliot Powers I am not positive of who was calling, but I think it was Mr. Powers, and he told me that this, I believe was a Friday. He told me that the day before, or that morning, some representatives of Parke, Davis had shopped our stores and found that we were not getting suggested prices on their products and that they were going to shop us the next day, and that if we were not getting suggested prices the next day, they would stop selling us products direct.

Q. Mr. Rosenthal, I would like to take you back to your first contact.

A. All right.

Q. At that meeting what was it in reference to? Was it to advertising or to prices, or both?

A. Prices. I remember no reference to advertising at the first conference.

Q. Now, did you take any action with respect to purchasing from wholesalers?

A. At that time? I do not believe at that time I was certain what Parke, Davis actually intended to do, so we at that moment did not do anything about trying to find any other sources.

[fol. 195] But I believe a couple of days later we had an order pending with Parke, Davis, and at that time it had gotten a little bit delayed, so then we thought possibly

Parke, Davis meant what they were saying, that they were actually going to discontinue selling us, so we decided to place some orders with some wholesalers.

Q. You had placed an order with Parke, Davis?

A. Yes.

Q. Do you recall approximately when that was placed?

A. I can't remember the exact date.

Q. Do you recall

A. I think it was about a week prior to this telephone conversation.

Q. Do you recall when that order was filled, if it was filled?

A. Well, eventually it was filled and it was filled about ten days to two weeks later than normally.

Q. Now, with respect to these wholesalers, what did you do with respect to them?

A. Well, my father at that time instructed our pharmaceutical buyer to place orders with the local wholesalers, Owens, Minor & Bodeker, and Powers Taylor Drug Company, and in the normal course of events, Parke, Davis products along with other merchandise, and the merchandise was shipped to the stores with Parke Davis products marked "out" from Powers Taylor Drug Company. In other words, they filled the other items on the order but the Parke Davis products were not shipped.

Q. What did you do if anything when this order came back with Parke, Davis marked "out"?

A. Well, the following day afterwards when Mr. Davis brought me the copies of the orders which I looked at and saw that the Parke, Davis orders were marked "Out," I called Mr. Russell, who was president of Powers Taylor Drug Company to inquire.

Q. What was the substance of that conversation?

A. Mr. Russell informed me that Parke, Davis had instructed him not to ship us Parke Davis products.

Q. Mr. Rosenthal, what was his reason for it?

A. Well, he felt at the time——

Mr. Gesell: No, objection, if your Honor please. It is not what he felt; what he said, if he said anything.

The Court: Yes.

By Mr. Peters:

Q. State to the best of your recollection.

A. Yes, he said that Parke, Davis that he felt his position with Parke, Davis and Company would be jeopardized if he sold us.

The Court: Is that what he said?

[fol. 197] The Witness: Yes.

The Court: Did he say "I feel"? Why do you say "he felt." What did he say?

The Witness: Exactly I cannot say, sir.

The Court: Well, put it in substance.

The Witness: That his position with Parke, Davis was going to be jeopardized if he shipped us goods contrary to their instructions.

By Mr. Peters:

Q. What happened with reference to Owens, Minor & Bodeker?

A. Their merchandise was shipped.

Q. Were there any other or further contacts with Parke, Davis around this time?

A. Yes. Again, now, about a week later again I believe, I received a telephone call from Mr. Powers in Baltimore and he said in substance that Standard Drug Company and Parke, Davis had been doing business for a long time together and he thought that this misunderstanding, we ought to be able to settle in some way, and that they would be willing to ship us merchandise again if we would agree not to advertise the merchandise in the newspapers nor with price signs in the windows, regardless of what we sold the goods for, but as long as we did not advertise the prices.

[fol. 198] Q. Did you make any commitments at this time, Mr. Rosenthal?

A. No, I told him I would like to discuss that with our lawyer before I could make such an agreement.

Q. What happened with respect to this matter?

A. I discussed it with the members of the firm and with our lawyers, and he called the next day again and he asked me what we had decided to do, and I said that we were instructed by our lawyers that we could not agree to do such a thing but, that over this period of time, I thought

that maybe we could work out something that would be satisfactory to Parke, Davis and ourselves so that we would not hurt them by advertising the products in rough price competition.

Q. What happened subsequent to that telephone conversation?

A. Well, shortly thereafter our order was released.

Q. During this time, and prior to 1956, what was your understanding, Mr. Rosenthal, of the Parke, Davis resale price policy?

A. Well, I had never been instructed in any way by Parke, Davis for selling prices on Parke Davis products. I had never had any discussion with them.

Q. I will ask you whether anyone else heard these conversations, any of these conversations with Parke, Davis [fol. 199] people?

A. Well, Mr. Steere was in on the original conversation with the three gentlemen, our drug buyer, and my father was in on one of the telephone conversations with Mr. Powers.

Mr. Peters: I pass the witness.

The Court: Cross examine.

Cross examination.

By Mr. Gesell:

Q. Mr. Rosenthal, you testified at the criminal trial?

A. Yes, sir.

Q. You testified that the first conversation you had was with Mr. Dripps and the second one was Mr. Powers. Today you have testified that both were with Mr. Powers. What is your best recollection about that?

A. I am not certain, sir.

Q. It may have been that the first was with Mr. Dripps?

A. Very well might have been.

Q. And the second one was with Mr. Dripps?

A. In fact, I believe you are correct.

Q. It is a little hard to recall these precise details after all this time?

A. Yes, very difficult with names.

[fol. 200] Q. You do not purport to remember the precise language used in either of those telephone conversations, do you; just the substance?

A. No, sir. I cannot. That is all.

Q. In the conversation that you had with Mr. Powers and Mr. Briggs, they were always talking to you about the District of Columbia, were they not?

A. Yes, sir. I believe so. I do not believe any specific reference was made to it, but that was my understanding at the time.

Q. And you understood they were shopping the District of Columbia stores?

A. Yes, specifically that time; in reference to that it was definitely the District of Columbia in that reference.

Mr. Gesell: No further questions.

The Court: You may step down.

(Witness left the stand.)

Mr. Peters: Mr. Samuel Rosenthal, please.

Thereupon SAMUEL ROSENTHAL, was called as a witness by counsel for the Government and, having been duly sworn, was examined and testified as follows:

[fol. 201] Direct examination.

By Mr. Peters:

Q. Will you state your name, address and occupation, please, sir?

A. Samuel Rosenthal, president of Standard Drug Company, Richmond, Virginia.

Q. What is your position with the Rosenthal Drug Company?

A. With Rosenthal?

The Court: Standard.

By Mr. Peters:

Q. I mean Standard, I am sorry.

A. I am president of the Standard Drug Company.

Q. How long have you been in the drug business, Mr. Rosenthal?

A. About 39 years.

Q. How long has Standard been operating?

A. The past 37 years.

Q. Now, Mr. Rosenthal, I direct your attention to the summer of 1956 and will ask you whether you were aware of the relationship, with what relationship existed with Parke, Davis and Standard Drug?

A. I of course was—

Mr. Gesell: I object to that. It seems like a vague question.

[fol. 202] The Court: You must make it more specific. I will sustain the objection.

Mr. Peters: All right, sir.

By Mr. Peters:

Q. Mr. Rosenthal, what was the relationship between Parke, Davis and Standard Drug in the summer of 1956?

A. We were customers of Parke, Davis & Company.

Q. In the summer of 1956 were you aware of any occasion which arose of Parke, Davis' criticism of your method of operation with respect to Parke-Davis products?

A. My buyers informed me that they had been told by the Parke, Davis representatives in our territory that they—the sum and substance was that they would discontinue selling us unless we raised the prices on Parke, Davis products to their suggested retail prices.

Q. What did you do, sir, with respect to that situation?

A. Well, since Parke, Davis products are very important in our business, and I did not know whether that was a threat or a reality, I intended to seek other sources for Parke-Davis merchandise.

Q. What other sources were these?

A. Wholesalers primarily.

[fol. 203] Q. What were the names of these wholesalers?

A. Well, one of them was Murray Wholesale Drug Company in Norfolk.

Q. What happened in that instance?

A. I called the president of Murray Wholesale Drug Company in Norfolk and asked him—and I told him the

story, and asked him if they were going to supply us the merchandise, that we needed Parke, Davis merchandise. Mr. Waitzer, the president of Murray Wholesale Drug Co., informed me that he had been notified by Parke, Davis and Company not to ship any of our stores their products.

Q. What was the reason he gave for this refusal?

A. Well, he did not have to give me any reasons. He presumed that I knew the reasons.

Q. Were there any other wholesalers involved?

A. Well, the following day I got a call from Washington, from Mr. Estrin, the President of the District Wholesale Drug Company, who informed me that he had been requested by Parke, Davis and Company not to ship any of their products to any of our Washington stores or to any of our Virginia stores.

Q. Did he give a reason for this action?

A. Well, same answer. He just assumed that I knew why.

Q. Why was this, Mr. Rosenthal?

[fol. 204] Mr. Gesell: Oh, I object to that. He cannot testify as to what he assumed was in Mr. Estrin's mind.

The Court: No, he can't but he can give us his understanding.

By Mr. Peters:

Q. What was your understanding?

A. My understanding was that Parke, Davis was not happy because we were not selling their products at their suggested retail price.

Q. Were there any other wholesalers involved, Mr. Rosenthal?

A. Yes. Well, we have two wholesale houses in Richmond that we do business with and I instructed our retail stores in Richmond to place orders for Parke, Davis merchandise direct with the wholesale houses in Richmond. That is our normal procedure. And one of them, one of the houses, that is, the Owens Minor & Bodeker Drug Company, I believe, filled the orders. These that we placed with Powers and Taylor Drug Company were not shipped.

Q. Now, Mr. Rosenthal, during this period did you hear any conversations between Mr. Gilbert Rosenthal and Parke, Davis representatives?

A. Yes. I was on the line when he was having a conversation with a man that said his name was Eliot Powers, who [fol. 205] was, I understand as a matter of fact, he told my son that he was the assistant to Mr. Dripps, the director for Parke, Davis in Baltimore. The conversation was in regard to prices.

Q. Do you recall any further substance or anything else being said?

A. Well, I can just give you the meat of the coconut.

Q. That is what I want.

A. He just wanted us to raise the prices of their products in the District of Columbia and in Virginia to their suggested retail prices.

Q. Was there any reference made to advertising?

A. I do not remember.

Q. Do you recall Mr. Gilbert Rosenthal testified there were three conversations. Do you recall which conversation this was?

A. I would say it was the third one.

Q. Was that subsequent to this conversation that the orders were filled from Parke, Davis—direct orders?

A. That was before the orders were filled.

Q. Did you make any commitment at this time?

A. I did not enter into the conversation at all.

Q. Did Mr. Gilbert Rosenthal?

A. I do not think he did.

Mr. Peters: I pass the witness.

[fol. 206] The Court: Cross examine.

Cross examination.

By Mr. Gesell:

Q. Well, now, perhaps I can help you a little in recalling the meat of the coconut, Mr. Rosenthal.

The last time you testified in this court on this matter you said, "And the substance of the conversation was that Mr. Powers requested us to withhold the advertising of Parke Davis products from the newspapers and to withdraw them from our window advertising, and if we did that, that they would resume shipping to us."

Does that refresh your recollection as to what Mr. Powers said?

A. It is two years ago. I do not know. That may have been the conversation.

Q. You actually do not really recall it any more, do you, the conversation?

A. Do I recall it——

Q. The details?

A. The details? The exact details?

Q. Yes.

A. No, I can't.

Q. It has been too long ago?

A. That is right.

Q. Mr. Rosenthal, at the present time you are selling [fol. 207] Parke, Davis products?

A. Yes, sir.

Q. You are buying from the wholesalers where you put in your orders?

A. Yes, sir.

Q. You are buying in the District and in Richmond?

A. Right.

Q. You are cutting prices in the District and you are cutting prices in Richmond?

A. I think we do.

Q. Do you cut in Virginia any longer?

A. Yes, sir.

Q. Even though the Fair Trade Law has gone in, in Virginia, you still cut?

A. It has not gone in yet.

Q. Has not gone in yet?

A. That is right.

Q. How long has this situation prevailed, that you have been buying from Parke, Davis and these other wholesalers and cutting prices?

A. Well, we have been buying from Parke, Davis I would say for 30 years.

Q. And during that whole time you have cut prices?

A. In the District, since we have been in the District, about 25 years.

[fol. 208] Q. And how long has it been that Parke, Davis has been selling you direct?

A. I do not know but I would say 30 years anyway.

Mr. Gesell: No other questions.

Mr. Peters: One further question, your Honor.

Redirect examination.

By Mr. Peters:

Q. Do you sell your Parke, Davis products in Virginia at prices below the suggested retail price of Parke Davis?

A. Many of their products we do, yes.

Mr. Peters: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Kenney: Mr. Russell.

Thereupon James W. Russell, was called as a witness by counsel for the United States and being duly sworn, testified as follows:

Direct examination.

By Mr. Kenney:

Q. Your name is James W. Russell?

A. Yes, sir.

Q. What is your address, Mr. Russell?

A. 3411 Monument Avenue, Richmond.

[fol. 209] Q. And could you tell us, please, what your occupation is at this time?

A. President, Powers Taylor Drug Company.

Q. What is the business of the Powers Taylor Drug Company?

A. Wholesale Druggist, selling in Virginia and North Carolina.

Q. And have you been its president since its inception, Mr. Russell?

A. No. I have been president only for the last ten years.

Q. How long have you been associated with this drug company?

A. Well, the last time since 1926. I was associated with them between 1909 and 1919.

Q. Have you been in the drug wholesaling business all your life, Mr. Russell?

A. Ever since 1902.

Q. Fifty six years?

A. Fifty six years.

Q. Now, Mr. Russell, does your company distribute the products of the Parke, Davis Company?

A. Yes, sir.

Q. And have you so distributed these products for a number of years?

[fol. 210] A. Yes, sir.

Q. Are you familiar with the wholesale policy of Parke, Davis Company?

A. Yes, sir.

Q. I want to show you Government's Exhibit 13 and ask you whether you will look at that and tell us whether that is the policy, as you understand it?

A. Yes, sir.

Q. Has this policy been in effect for as long as you can recall, Mr. Russell?

A. Well, I would say certainly it has been in effect for the last ten years, or thereabouts.

Q. At least ten years?

A. I would say so.

Q. Now, under the Parke, Davis policy that company established the prices for which you may sell its products, isn't that correct?

A. Yes.

Q. And it also provides that you can only sell Parke Davis products at the so called recognized drug outlets?

A. Yes, sir.

Q. Did you ever hear, as a part of this policy, Mr. Russell, that you could not sell to drug retailers who were cutting prices?

[fol. 211] A. No, sir.

Q. You never heard that?

A. No, sir.

Q. Now, Mr. Russell, to your knowledge, does Parke, Davis sell direct to retailers?

A. Yes, sir.

Q. Do you know whether they give these retailers so-called quantity discounts?

A. Yes, sir.

Q. Are you permitted by Parke, Davis to give the retailers quantity discounts?

A. No, sir.

Q. So that there is competition between your company and Parke, Davis; is that correct, sir?

A. Yes, sir.

Q. Now, I want to turn your attention, Mr. Russell, to the summer of 1956, and to be more specific, to the month of August in 1956, and I will ask you if at that time you had a telephone conversation with a representative of the Parke, Davis Company?

A. I had two conversations with representatives of the Parke, Davis Company, about the same time.

Q. Well, I am referring to the first conversation, Mr. Russell.

A. One was in reference to selling to non-drug outlets.

[fol. 212] Q. And was this in 1956?

A. In the month of July or August of 1956.

Q. And with whom did you have this conversation?

A. Supposed to be a representative of Parke, Davis in Baltimore.

Q. Did he give you his name?

A. No, sir.

Q. Was it Mr. Dripps?

A. Could not say.

Q. Would you remember the name if I were to mention it?

A. No, I would not.

Q. Directing your attention further to another conversation, did you have a conversation with someone from the Parke, Davis Company with regard to the Standard Drug Company?

A. Yes, sir.

Q. Now, the Standard Drug Company is a drug retailer, is it not, sir?

A. Yes, sir.

Q. And it operates in Richmond, Virginia?

A. That is right.

Q. And have you been doing business with Standard Drug for a number of years?

[fol. 213] A. Yes, sir.

Mr. Gesell: Now, I do think this leading must stop sometime. I have been very tolerant, Mr. Kenney.

The Court: It does not make any difference. I will allow the question.

By Mr. Kenney:

Q. You may answer the question.

A. What was the question?

(The reporter read the pending question.)

The Witness: Yes, sir.

By Mr. Kenney:

Q. Can you now recall, Mr. Russell, the conversation which you had with a Parke, Davis representative concerning Standard Drug?

A. I was instructed—called and instructed not to sell Parke, Davis Goods to Standard Drug Store, or any of its branches.

Q. And can you tell us who the person was in Parke, Davis that told you this?

A. I do not know, no, sir.

Q. You do not recall at this time?

A. No, sir.

Q. Did he tell you why you were not to sell to these others?

A. No, sir.

[fol. 214] Q. He did not?

A. No, sir.

Q. What did you tell him, Mr. Russell?

A. I says, "Well, if that is what we have to do, we will have to abide by it."

Q. You told him that, sir?

A. Yes, sir.

Q. Now, after this conversation, did you take any steps as far as your own organization is concerned, about selling to Standard?

A. Yes, sir.

Q. What did you do, sir?

A. I told my department heads not to sell Standard Drug Company any Parke, Davis goods, and if they wanted to know the reason why, to come to me.

Q. Now, shortly after this conversation, do you recall whether your company received an order from Standard Drug for some Parke-Davis products?

A. Yes, several of them.

Mr. Kenney: Would you please mark this Government exhibit for identification No. 14?

Deputy Clerk: Government Exhibit 14 for identification.

(Powers-Taylor Drug Billing was marked for identification Government Exhibit No. 14.)

[fol. 215] By Mr. Kenney:

Q. Mr. Russell, I show you Government Exhibit for identification 14 and I will ask you if you can identify that?

A. Yes, sir, that is one of our billings.

Q. That is one of your billings?

A. Yes, sir.

Mr. Kenney: I now move government exhibit 14 for identification into evidence.

The Court: Without objection, it may be received.

Mr. Gesell: No objection.

(Powers Taylor Drug Co. billing previously identified Government Exhibit 14 was received in evidence.)

By Mr. Kenney:

Q. Now, Mr. Russell, is this a billing of your company to the Standard Drug?

A. Yes, the Standard Drug Co., Carey Street.

Q. Can you tell us if that contained any order for Parke, Davis Products?

A. Well, there is one two, at least four of them.

Q. Four Parke, Davis products.

Now, did you send those Parke, Davis products to Standard Drug?

[fol. 216] A. No, I did not.

Q. You did not fill the order?

A. No, sir.

Q. Were the products in stock at the time?

A. Well, some of them certainly were in stock. I could not say about all of them.

Q. But you know that some of them were?

A. Some of them were.

Q. Now, did you have a conversation with anyone in Standard Drug about this order, Mr. Russell?

A. Well, I do not know whether it was that order or some other order, but I had a conversation with Mr. Gilbert Rosenthal.

Q. And what did you tell Mr. Rosenthal?

A. I told Mr. Rosenthal that I had been instructed by Parke, Davis not to sell Standard Drug Company or its branches Parke, Davis goods.

Q. And did Mr. Rosenthal say anything to you during this conversation?

A. He says, "Well, you know, that is a rather serious thing."

I says, "I appreciate that, but"——

Q. Did you give Mr. Rosenthal this information in observance with the instructions from Parke, Davis?

A. Well, Parke, Davis did not instruct me to tell that. [fol. 217] no, I did

Q. Go ahead, sir.

A. I gave it on my own initiative. I was not making any secret of it.

Q. As a result of this phone conversation?

A. Yes, sir.

Q. Now, I ask you if you can recall for what period of time you refused to serve Standard Drug with Parke, Davis items?

A. I would say only about three weeks, four weeks, and then I made a call, myself, to Parke, Davis to have it checked, and I made a person to person call to Mr. Dripps.

Q. And do you know who Mr. Dripps is?

A. I do not.

Q. You do not know who he is at this time?

A. No, I do not.

Q. You do not know who he is at this time?

A. I would not know him if I saw him today.

Q. Did you put in a person to person call to Mr. Dripps in Baltimore?

A. Person to person call to Mr. Dripps.

Q. Why did you place the call to Mr. Dripps, Mr. Russell?

A. Because he was the head of the Baltimore branch.

Q. And you knew that?

[fol. 218] A. I knew that, yes.

Q. What did you tell Mr. Dripps during this conversation?

A. I asked Mr. Dripps if the Standard Drug Company question had ever been settled, and Mr. Dripps replied to me it had been settled, and he thought that I had been notified, and that it was a very unfortunate affair. I remember those words that he used.

Q. And this was the 27th of September?

A. The 27th or 28th. Something of that sort.

Q. Now, after this conversation with Mr. Dripps did you again commence to sell to Standard?

A. Yes, sir, anything that they wanted from Parke, Davis, yes, sir.

Mr. Kenney: Pass the witness.

Cross-examination.

By Mr. Gesell:

Q. Have you been dealing with Standard ever since that time?

A. Yes, sir.

Q. At the time that the Parke-Davis representative spoke to you about selling to non drug outlets they did not ask you to make any agreement, did they?

A. No, sir.

Q. They simply told you that if you sold to non drug out

[fol. 219] lets, you would be cut off?

A. Yes, sir.

Q. At the time they talked to you about selling to Standard, you knew Standard was a price cutter?

A. I knew that, but nothing was mentioned about their cutting of prices in the telephone conversation.

Q. They did not ask you to make any agreement?

A. No, sir.

Q. And you did not make any agreement about Standard?

A. No, sir.

Q. You understood that, if you sold Standard, you would be cut off?

A. That is right

Mr. Gesell: That is all.

Mr. Kenney: One further question.

Redirect examination.

By Mr. Kenney:

Q. If it had not been for this conversation with the representative of Parke, Davis, you would never have stopped selling Parke, Davis products to Standard, would you, sir?

A. No, sir.

Mr. Kenney: That is all.

The Court: You may step down, Mr. Russell.

[fol. 220] (Witness excused.)

Mr. Kenney: May we have our morning recess?

The Court: Yes, indeed.

(A brief recess was taken.)

The Court: Let us proceed.

Mr. Kenney: Your Honor, I feel I must apologize on this question of witnesses. We are going unbelievably fast here. I had provided for six this morning.

The Court: To the great satisfaction of the Court you are proceeding very well.

Mr. Kenney: Thank you, sir.

Our other witnesses will not be available until tomorrow. They are out of town.

I would suggest that we will finish early this afternoon and while I do not like to discommode the Court too much, I do not think there is anything I can do about it.

The Court: I am here at your pleasure. If it is agreeable with Mr. Gesell.

Mr. Gesell: It is quite all right.

Mr. Kenney: I will now call Mr. Bradshaw.

Thereupon John E. Bradshaw was called as a witness by counsel for the Government and being duly sworn, was examined and testified as follows:

[fol. 221] Direct examination.

By Mr. Kenney:

Q. Give your full name for the record.
A. John E. Bradshaw.
Q. What is your address?
A. 28632 West Calong Circle, Birmingham, Michigan.
Q. You are an attorney, are you not?
A. I am.

The Court: Birmingham, what?
The Witness: Michigan.

By Mr. Kenney:

Q. You are an attorney?
A. I am.
Q. And are you employed as house counsel by Parke-Davis?
A. I am the assistant general attorney for Parke, Davis & Company.
Q. How long have you been with Parke, Davis?
A. Eleven years.
Q. And can you tell us who your immediate superior is?
A. Kenneth D. McGregor.
Q. As attorney for Parke, Davis, Mr. Bradshaw, do you advise the company on its legal problems?
[fol. 222] A. I do.
Q. Including anti-trust problems?
A. Yes, sir.
Q. Now, Mr. Bradshaw, my main purpose in calling you to the stand is to interrogate you a little bit on this policy that we have heard so much of from Mr. Gesell, and this particularly is the wholesale and retail policy which is not in writing but which I understand has been a long-term practice of Parke, Davis.

Now, is it true, sir—referring to the wholesale policy—that there is an additional policy which is not in writing?
A. Well, there may be additional policies with which I am not familiar. I suppose you have reference to whether or

not there is a policy with respect to refusing to sell wholesalers who sell to price-cutters; is that what you mean?

Q. That is exactly what I mean, sir. Is there such a policy?

A. I understand that there was such a policy.

Q. There was such a policy?

A. That is right.

Q. Was there such a policy in 1956?

A. Once again I will have to say that I am not sure that there was a policy, but the question I know was presented [fol. 223] to me as to whether we could lawfully refuse to sell wholesalers who sold to price cutters.

Q. What I have reference to, Mr. Bradshaw, is this: Mr. Gesell has made the statement that for many, many years it has been the policy of Parke, Davis that any wholesaler who sold to a price-cutting retailer would be cut off.

Are you acquainted with that policy?

A. I can give you only an impression, Mr. Kenney, and my impression is that there has been such a policy.

Q. That is your impression?

A. That is right.

Q. Sir, let me read you a statement which Mr. Gesell made in the criminal trial, and this is in his opening statement:

He says: "Now; this policy is quite clear"

Mr. Gesell: I had not realized, your Honor, I was a defendant in this case in some way.

Mr. Kenney: You have been quoting me and now I want to quote you a little bit.

Mr. Gesell: Can't we get the issues in the case?"

The Court: One at a time, please.

Mr. Kenney: I will be glad to tell you why, sir. You heard Mr. Gesell make the statement more often than not that this [fol. 224] is a long-established policy of Parke, Davis.

The Court: Suppose he did.

Mr. Kenney: Well, I am going to show that it is not, and I am going to show that it is not in writing as he said it was at the criminal trial.

Mr. Gesell: Well, whatever the fact is, what difference does it make?

The Court: That is just what I want to get at.

Mr. Kenney: It makes a lot of difference, your Honor.

The Court: You can interrogate this witness, Mr. Kenney,

with respect to this unwritten policy as you call it, and as long as it existed, if he knows, or if he does not.

Statements of counsel are not evidence, you know.

Mr. Kenney: Well, I know that, sir, but I have wondered sometimes in this Court whether they were.

The Court: Before me?

Mr. Kenney: No, sir.

The Court: All right, go ahead, then.

Mr. Kenney: I want to question him about this policy and I want to question him about this question of what the firms now do.

By Mr. Kenney:

Q. Now, you are acquainted with this policy generally; [fol. 225] are you not, Mr. Bradshaw?

The Court: Which policy?

Mr. Kenney: The policy — the wholesaler policy of Parke, Davis.

The Witness: Yes, sir.

By Mr. Kenney:

Q. Is it true, then, that Parke-Davis has a wholesale policy?

A. It is.

Q. — which says that a wholesaler can not sell to a retailer who is cutting prices?

A. You are asking me whether we have such an unwritten policy or whether we have ever put it in writing?

Q. First, I will ask you if there ever was such a policy.

A. Yes.

Q. And can you tell me when this policy was first adopted?

A. I can not.

Q. Was it ever put in writing?

A. I have seen it in writing.

Q. When did you see it in writing?

A. I can not fix a precise time but it was during the preparation for the criminal trial.

[fol. 226] Q. And you saw a policy in writing which says that the wholesalers can not sell to price-cutting retailers, is that right?

A. I saw a statement which said that we would cut off wholesalers who did sell to price-cutting retailers.

Q. Was this a policy in writing?

A. Yes.

Q. Was this a policy that was distributed to wholesalers?

A. As to that I cannot answer, I do not know.

Q. Do you know whether the wholesalers in the Washington, D. C. area and the Richmond, Virginia area were ever advised of that?

A. I do not know.

Q. You do not know?

A. No.

Q. Well, you know Mr. Dripps, do you not?

A. Yes, of course.

Q. And Mr. Dripps is in charge of the Baltimore office of Parke, Davis?

A. He is.

Q. He would be the senior member of the company in this area, is that right?

A. Yes, sir.

[fol. 227] The Court: You mean the senior officer?

Mr. Kenney: The senior officer, yes.

The Witness: No, sir.

Mr. Gesell: He is not an officer.

The Witness No, he is not an officer.

Mr. Kenney: Very well, he would be the senior employee.

The Witness: Yes, sir.

The Court: Oh.

Mr. Kenney: The one responsible for the functions in this area.

The Court: Managerial responsibility.

Mr. Kenney: Managerial, yes.

The Court: Go ahead.

The Witness: He is the branch sales manager.

The Court: I see.

By Mr. Kenney:

Q. Well, would it be Mr. Dripps' responsibility to advise his customers, including both the wholesalers and the retailers, of the Parke, Davis policies?

A. Well, I do not know whether he has been instructed to advise them of a policy or policies, whether he has some freedom in—whether he thinks it is necessary to advise them.

Q. It would be the responsibility of someone in Parke, [fol. 228] Davis, would it not, to inform the customers, both wholesale and retail customers, what the policies of Parke, Davis are?

A. I should think if the occasion arose.

Q. Well, do you know who would have the responsibility for informing them of these policies?

A. Oh, I think Mr. Dripps would in this area.

Q. Now, Mr. Bradshaw, in the summer of 1956, did Parke Davis have in existence a policy which provided that anyone in a non-fair trade area who cut the suggested prices of Parke, Davis, would be cut off from buying from Parke, Davis?

A. Again I can only state that it is my impression that we had such a policy, and I recall being asked whether we could do it.

Q. It is your impression that there was such a policy in force?

A. That is right.

Q. Now, had that policy been in force for many years, to your knowledge?

A. To my knowledge I can not answer it, sir.

Q. You can not answer?

The Court: Can you for the last eleven years?

The Witness: No, I can not because these matters would come to me only if some question arise, your Honor.

[fol. 229] The Court: I see.

By Mr. Kenney:

Q. Let me ask you this, sir. Did Parke, Davis have, in the summer of 1956, a policy which said that any retailer who advertised at below the minimum suggested retail prices of Parke, Davis in non-fair trade areas, would be cut off?

A. I know of no such policy.

Q. Well, do you know that such a policy was attempted to be enforced in this area?

A. Only what I have gained from the present litigation and the preceding litigation.

Q. Well, now, is it not true that if Parke, Davis had a policy such as the one we have been talking about, that it has now been abandoned?

A. Yes, I would say that it has been abandoned.

Q. And is it not true, sir, that a primary reason for the abandonment of this policy has been this anti-trust case and investigation?

A. I would not say that that is the primary reason, Mr. Kenney.

Q. It is one of the reasons, is it not?

A. I think it may be one of the reasons, but remember, I do not make the policies. The sales department makes them. [fol. 230] Q. Let me ask you this: Parke, Davis is currently involved in a case in Maryland against Herbert Haft and Dart Drug alleging violations of the Fair Trade Act, is it not?

A. Yes, sir.

Q. And, during the course of this hearing, is it not a fact, sir, that some mention has been made of current litigation which we are now considering here?

A. Yes.

Q. And were you not put on as a witness for Parke, Davis in that case?

A. I was.

Q. And did you not testify that one of the reasons Parke, Davis had abandoned this policy was because of the anti-trust trouble which had occurred?

A. I may have said that it was one of the reasons, and I think I have said so here, but not necessarily the primary reason.

Q. I will ask you if it is not true that that is one of the reasons for the abandonment of this policy?

A. I think it probably is.

Q. Well, could you tell me definitely yes or no?

A. No, for the simple reason that I do not make the policies.

[fol. 231] Q. Well, I will ask you again, though: You did testify in Maryland, did you not, sir, with regard to this particular case, this particular area, and this particular practice, that one of the reasons the practice was abandoned, even though it had been in effect for a number of years, was this anti-trust problem which had arisen because of it?

A. I think probably I expressed that as my opinion. I do not recall the precise language.

Q. Well, sir, I will read it to you just so we can be clear. I have before me what purports to be a transcript of your testimony in Maryland.

Mr. Gesell: Would you give us the page, please?

Mr. Kenney: Yes, sir. Page 59, and this is Mr. Bradshaw's testimony, only.

By Mr. Kenney:

Q. And at page 59 you were asked by Mr. Isbell (you made this statement — strike that, please.

At page 59 Mr. Isbell asked you:

"Can you tell me if this policy has been abandoned since its application at Dart?"

And you said, "In Maryland, you mean?"

Mr. Isbell said, "I mean in general, by the company."

[fol. 232] There was an objection by opposing counsel, the Court said, "The objection will be overruled."

You were entitled to answer. You said, "Yes, the policy has been abandoned."

Then Mr. Isbell said, "Can you tell the reasons for that?"

You said, "Because it proved to be ineffective."

Mr. Isbell said, "Did it prove to have any other disadvantages?"

"It got us into anti trust difficulty."

So, it is true, is it not, sir, that one of the reasons you abandoned this policy was because of the anti trust difficulty?

A. In my judgment, yes.

Q. Now, do you remember prior to the time that this case was brought by the Government, visiting me and others, representatives of the Department of Justice?

A. I do.

Q. Do you consider that the conversation that we had at that time is privileged?

A. Are you asking me now as a matter of academic law or would I want to claim privilege?

Q. Well, I would like to ask you, sir, if you consider any admissions that you may have made during this conversa

[fol. 233] tion would be privileged as far as you are concerned, in your opinion?

A. Yes, I think they would be.

Q. You think they would be?

A. Yes.

Mr. Kenney: That is all.

The Court: Any cross examination?

Mr. Gesell: I am going to have to think about it, your Honor.

The Court: Go ahead. Take your time.

Mr. Gesell: It is the most extraordinary ending to an examination I have ever heard in my life.

Mr. Kenney: We try to do the extraordinary.

Cross-examination.

By Mr. Gesell:

Q. You are not claiming any privileges to any conversation you had with Mr. Kenney, are you?

A. I understood him to ask me whether I would consider it privileged and I would.

Q. You are not claiming any privilege, are you?

A. No, I have not been asked whether I would claim or disclaim it.

Q. Is it not a fact that when you talked to Mr. Kenney you showed him a written statement of the advice you had given the company and he read it and he said he agreed with [fol. 234] the advice, and that you were properly interpreting the anti trust laws?

A. I do not know whether I showed him the written statement but I told him, or he saw it. I either showed him something I had written or told him of the advice I had given and asked him whether it was wrong in substance. I figured he knew more about anti trust law than I did. And he said that he agreed with it.

Q. And that was the advice you had given to the company, that they had a right to cut off and refuse to sell under the Colgate doctrine?

A. I had.

Q. Now, when you testified out in Maryland and you said the policy had proven ineffective and had been abandoned,

that had occurred long before there was any anti-trust litigation, right?

A. I do not recall precisely when the anti trust litigation started.

Q. The policy was not enforced in the latter part of 1956, was it?

A. It was not enforced in the latter part of 1956.

Mr. Gesell: Will you mark this document as Defendant's exhibit 3 for identification?

(Memorandum dated 4-6-56 to Mr. Johnson was marked for identification Defendant's exhibit No. 3.)

[fol. 235] By Mr. Gesell:

Q. I show you defendant's exhibit 3 for identification, a memorandum dated April 6, 1956, addressed to Mr. Karl Johnson. Is that not a memorandum prepared by you?

A. Yes, sir, I believe it is. The signature is cut off well, yes, I can see it, sir.

Q. And this is the memorandum which was handed to the Department of Justice at the time of the Grand Jury investigation?

A. Yes, sir.

Q. And this is the memorandum that contains the advice you gave as to the anti trust laws, is it not?

A. That is one of the memoranda that was on that subject.

Mr. Gesell: No other questions.

Mr. Kenney: I have a few.

Redirect examination.

By Mr. Kenney:

Q. First on this abandonment of policy, it was not being enforced in the fall of 1946, is that not correct?

A. It was not to the best of my knowledge.

Q. But Parke, Davis was well aware at that time that the anti-trust division was investigating it, was it not?

A. I think I would say yes, to that.

[fol. 236] Q. Now, Mr. Johnson, getting to this memorandum of April 6, in here you are actually discussing the

Colgate case, are you not, Mr. Bradshaw? This is the memorandum that you wrote on April 6?

A. The memorandum, of course, does not mention the Colgate case but it would——

Q. That is the law of the Colgate case?

A. In substance.

Q. Mr. Bradshaw, could you tell us what gave rise to the writing of this memorandum: why you wrote it?

A. Well, I was asked and I have a recollection that it resulted from a question of our right to cut off in the District of Columbia a retailer who was opening a branch in Maryland for the purpose of enforcing Maryland Fair Trade.

Q. Now, this memorandum that you refer to was written by Mr. Dripps, was it not?

A. I think so.

Q. And it showed that in the spring of 1956 Mr. Dripps had no realization that Parke, Davis would not sell to a retailer in the District of Columbia, a non-fair trade area, who was cutting prices; is not that correct, sir?

A. I do not know because I do not have the memorandum. [fol. 237] Mr. Kenney: Would you mark this Government exhibit 15.

(Memorandum from Mr. Dripps was marked Government exhibit 15 for identification.)

By Mr. Kenney:

Q. I show you Government exhibit 15 and ask you if this is the memorandum from Mr. Dripps that you saw?

A. Yes, this is the memorandum I saw.

Mr. Kenney: I would like to offer government 15 in evidence.

Mr. Gesell: I think, your Honor, that requires the introduction of the response to it, in order to have the full response, under the complete evidence rule.

The Court: Have you the response?

Mr. Gesell: That would be our defendant No. 3, your Honor. If you are going to offer the letter, you have to put in the response in order to have the record complete.

The Court: I think so.

Mr. Kenney: Do you want to move the response in?

Mr. Gesell: I am not moving it in. You will have to move

it in or I will object to the introduction of the letter, on the ground it is incomplete. You cannot put in a communication that way without the response.

[fol. 238] The Court: I will sustain the objection. If you have that response, please put it in.

Mr. Kenney: I will be delighted to put it in.

By Mr. Kenney:

Q. Now, let us talk about government 15. Are you familiar with it after a reading, Mr. Bradshaw, or would you like a copy of it before you?

A. I think I am generally familiar with it. It might help to have a copy.

Mr. Gesell: Here is a full copy, sir.

The Witness: Thank you.

By Mr. Kenney:

Q. Looking at that exhibit, and I am referring to Mr. Dripps' memorandum rather than your own——

A. Yes.

Q. Is it not true that in March 1956, Mr. Dripps had no realization that there was a policy of the Parke, Davis Company which would permit him to cut off in a non-Fair Trade area a retailer who was selling at less than suggested minimum retail prices?

Mr. Gesell: I object to that. The memorandum is in front of the Court and the Court can read the memorandum. He cannot surmise what was in Mr. Dripps' mind.

[fol. 239] The Court: No, but I think the witness can tell from what he knows, from his position, and from the exhibit, what the answer should be.

I will overrule the objection.

The Witness: I think it would be an inference that could reasonably be drawn that Mr. Dripps had no such realization, but I can go no further than that.

Mr. Kenney: Your Honor, I would like to have the exhibit handed up.

Your Honor, this is a rebuttal exhibit and was not included in the list we gave your Honor.

The Court: You may continue. I will read this.

By Mr. Kenney:

Q. Now, you advised Mr. Johnson in response to this memorandum of Mr. Dripps at Mr. Johnson's request, did you not, sir?

A. I did.

Mr. Kenney: Would you please mark this Government 16 for identification?

(A memorandum was marked for identification Government Exhibit 16.)

Mr. Gesell: What is this?

Mr. Kenney: This is the memorandum referred to.

Mr. Gesell: It is already in evidence.

Mr. Kenney: It is Defendant's 3, is that it?

[fol. 240] Mr. Gesell: No, I think it is your exhibit.

The Court: What number is this exhibit I have in my hand?

Mr. Kenney: No. 15.

Mr. Gesell: By your Honor's pardon, I think it is half the exhibit. There is another sheet attached to it that was, under your Honor's ruling, that came in with it—the Opinion.

Mr. Kenney: Yes, sir, and there is a copy of that.

By Mr. Kenney:

Q. In your advice to Mr. Johnson, you make the statement, do you not, sir, that Parke, Davis Company say to these retailers, "We will sell you only so long as you observe minimum retail prices"?

Right?

A. I do.

Q. But Parke, Davis can not say legally, "We will sell you only if you agree to observe such minimum retail prices"?

A. I do.

Q. Now, that is your interpretation of the Colgate case, is it not, sir?

A. The Colgate and other cases.

[fol. 241] Q. Yes, unilateral activity on the part of Parke Davis.

Now, Mr. Bradshaw, is it not true that, as far as advertising at cut prices is concerned, Parke, Davis makes no dis-

tinction between cutting prices and advertising at cut prices?

Mr. Gesell: I object.

The Court: Is that in the present tense?

Mr. Kenney: Well, I will direct his attention to the summer of 1956, and ask you if it were true at that time.

Mr. Gesell: Now, I must object to that general question. There is no proof yet from this witness that he knows anything about the advertising policy. He was asked about it and says he does not know anything about it.

The Court: The witness can answer he does not know.

Mr. Gesell: He was not here.

The Court: Overruled.

The Witness: I do not know.

By Mr. Kenney:

Q. Let me ask you this: In response to my question about your visit to me and to other representatives of the Department, you say you are claiming no privilege?

[fol. 242] A. I am not.

Q. Now, is it not a fact, sir, that during that discussion with me, I put the question to you that, if the Government could show that there was an understanding between Parke, Davis and these retailer druggists, that the druggists would not advertise at cut prices, it would be a violation of the anti trust laws, and you said, "Yes"?

A. I do not recall that.

Q. You do not recall it?

A. I do not.

Mr. Kenney: That is all.

Mr. Gesell: No questions.

The Court: All right, you may step down, Mr. Bradshaw.

(Witness excused.)

Mr. Kenney: That is all the Government has this morning, sir.

The Court: Will you have anything this afternoon?

Mr. Kenney: One witness.

The Court: Well, you remember when we started this case you assumed that the Government would be through by Friday, and I thought that was very, very rapid for an anti

trust proceeding, and I guess you wil' be able to keep your [fol. 243] word.

Mr. Kenney: Yes, sir.

The Court: I doubted that you would get through by that time.

Mr. Kenney: Yes, sir, but one reason we will, your Honor, is because this evidence has gone in, in a prior case, most of it.

Now, Mr. Bradshaw's evidence did not. We have been moving very rapidly.

When the Defendant puts on its case, I think it will move a little slower.

Mr. Gesell: If we have to put any case on.

The Court: That is always the "if".

Well, the Court will stand recessed until 1:45.

(At 11:50 a.m. the trial was recessed until 1:45 p.m.)

[fol. 244] AFTERNOON SESSION

(Pursuant to recess the trial was resumed at 1:45 p.m.)

Mr. Kenney: Your Honor, I would like to state for the record that Mr. Gesell has stipulated with me that the following figures represent the dollar value of sales made by Parke, Davis in certain areas in 1956.

The total dollar value of sales directly to retailers in the District of Columbia was $499,304.

The total dollar value of sales to wholesale dealers in the District of Columbia was $161,247.

The total dollar value of sales directly to retail dealers in Richmond, Virginia, was $58,870, and the total value of sales to wholesale dealers in Richmond, Virginia was $113,651.

Mr. Bradbury.

Thereupon HOWARD BRADBURY, was called as a witness by counsel for the Government and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

Q. Your name, sir, is Howard M. Bradbury?
[fol. 245] A. Yes, sir.
Q. And what is your address?
A. Home?
Q. Home address?
A. Route 1, Box 73, McLean, Virginia.
Q. Tell us what your occupation is?
A. Well, I am a pharmacist by profession, and I am the president and chairman of the Board of Directors of the Washington Wholesale Drug Exchange.
Q. In 1955 what was your occupation?
A. I was all of those and General Manager as well.
Q. What is the formation of the Washington Wholesale Drug Exchange? Of what does it consist?
A. It is owned and operated by the Retail Druggists.
Q. It is a cooperative?
A. It is a cooperative.
Q. Do you share the profits on your sales with your members?
A. We do.
Q. Are these profits also shared with non-members who purchase from you?
A. Yes, all equally.
Q. Anyone who purchases from you?
[fol. 246] Yes, sir.
Q. In 1955 and prior to that time, and continuing today, did the Washington Wholesale Drug Exchange handle products of the Parke, Davis Company?
A. Yes.
Q. Does the Washington Wholesale Drug Exchange sell exclusively to dealers – retailers in the District of Columbia?
A. Oh, yes, we do. Not just the District of Columbia.
Q. Do you have another territory?

A. This trading area. Let us call it this trading area. We have Northern Virginia, and surrounding Prince Georges and Montgomery Counties.

Q. The Metropolitan area of the District of Columbia?

A. Yes, sir.

Q. Do you know whether Parke, Davis sells also directly to retailers?

A. They sell directly to some retailers.

Q. Do you know whether Parke, Davis gives volume discounts to its retailer customers on occasion?

A. I cannot answer that; I just do not know how they transact in dealing with the retail.

Q. Does the Washington Wholesale Drug Exchange give [fol. 247] volume discounts on Parke Davis products to its members?

A. If there is a quantity in the catalog that has a different price, we would follow it. We follow Parke, Davis' catalog.

Q. You follow the prices that Parke, Davis gives you, right?

A. That is right.

Q. Do you also follow their policy with reference to sales to non drug outlets?

A. Well, that would be easy for us since we do not sell food outlets at all, being druggists, ourselves.

Q. Would you explain to the Court how the drug firms that purchase from you share in any profits which you might make during the course of a year?

A. Well, we operate as reasonably as we can and at the end of the year, that is calendar year, we take inventory and in a couple of months, we are able to get what our net profit is, operating profit above expenses.

Q. I want to direct your attention to the year of 1956 in the month of October.

A. Yes, sir.

Q. And ask you if at that time you were giving so called deferred discounts on Parke, Davis products?

A. That is true, yes.

[fol. 248] Mr. Gosell: Now, your Honor, I have an objection that goes to this line of testimony on which I would like to be heard.

The Court: You may be.

Mr. Gesell: There are two counts in this complaint: The first and the second count. As your Honor knows, the second count has been dismissed with prejudice.

The Court: Yes.

Mr. Gesell: Mr. Kenney is starting in examination concerning discounts in October, 1955. That is the period covered by the second count which has been dismissed with prejudice.

The conspiracy on trial here, and the only conspiracy that we can direct our attention to, is one that is claimed both by the interrogatories and by the complaint, itself, to commence as of July, 1956.

Therefore, I think going into the subject matter of count 2 is irrelevant and immaterial to the cause of action on trial.

Now, it is true that Washington Wholesale is claimed to be a co-conspirator, also, under the First Count, but certainly the testimony must relate to events within the period of the conspiracy claimed in the First Count which did not commence until July, 1956.

[fol. 239] Mr. Kenney: Now, I would answer that, sir, first on the question of commencement.

It is true that we alleged that this conspiracy started approximately in July of 1956. In an anti trust case, by long lines of decisions, the Government is permitted to go, in one instance as far as 13 years back of the date alleged in the charge, if it were the same conspiracy.

I do not think there is any problem on that.

Now, on Mr. Gesell's other argument, the government, itself, dismissed this second cause of action and it dismissed it with prejudice. We did that, sir, because we came to the conclusion that the evidence set up under that second cause of action properly belonged under this first cause of action.

We have charged here a conspiracy to fix prices at the wholesale and retail level. This evidence goes to that charge.

The Court: How about your second count?

Mr. Kenney: The second cause has been dropped. It is dismissed, sir.

The Court: I know, but Mr. Gesell says your first cause of action was confined to the violation of the Sherman Act, and certain limits as to time.

Mr. Kenney: Sir, we are not pinned down to any specific time.

[fol. 250] As I pointed out, in the case of Hale vs. Hickey, a U.S. Supreme Court case, the Court allowed the Government to go 13 years before the date charged in the action.

The Court: Connecting it up with that date?

Mr. Kenney: Yes, sir.

The Court: How are you going to connect this up?

Mr. Kenney: Sir, we say that the evidence this man is going to give will be connected up with the charge that the government makes in the first cause of action. It goes to the fixing of wholesale prices.

Mr. Gesell: There is nothing in the first cause of action that has to do with discounts. That was the subject of the second cause.

The Court: I will overrule your objection with the understanding that you make a motion to strike if, in the opinion of the Court, it should be granted.

Mr. Gesell: Very well.

By Mr. Kenney:

Q. Now, Mr. Bradbury, once again directing your attention to the month of October, 1955, were you at that time giving deferred discounts on Parke-Davis products to members who purchased those products from you?

A. Yes.

Q. Now, could you tell the Court how these deferred dis-
[fol. 251] counts operated?

A. Well, as I said, we take inventory at the end of the calendar year and determine our operating profit.

Now, after the deduction of expenses, we arrive at net profit before income taxes, and at this point we set aside a sum of money for distribution to our retailers proportioned to their purchases.

There are some manufacturers who object to that distribution and we have earmarked that profit before Federal taxes for other purposes, such as to add to surplus and to declare dividends on stock.

Q. Now, prior to October of 1955, you were giving your deferred discounts on Parke, Davis items to your members?

A. Yes, sir.

Q. During the month of October, did you have a conversation with Mr. Dripps of Parke, Davis on this subject?

A. Yes.

The Court: October of 1955?
Mr. Kenney: Yes.

By Mr. Kenney:

Q. Can you tell us where this conversation took place?
A. In my office.
[fol. 252] Q. Can you tell us what was said during this conversation?

A. Yes, Mr. Dripps and several other men that I do not know, came into the office and Mr. Dripps asked me if we were giving rebate, or deferred discounts, on Parke, Davis goods.

I told him yes, we were, and he wanted that discontinued.

Since we have a method of handling that, it would be in line with requests of other manufacturers, I went along with it and said, yes, I would do it, and I asked the boon, however, to start it on November 1, since it was in the middle of the month and for bookkeeping purposes, I would like to start it on November 1.

So he said he wanted me to notify the trade. That is my testimony, sir, that that was going to happen. And I asked him in return for that, if we would be permitted to give the cash discount when we made the billing, so that we could be in line with competition, because we did not give a cash discount.

In lieu of cash discount, we were giving this rather larger return. And he said, "Yes, we could give the 2 per cent off."

So we went out and sent out a bulletin. It stated—on the first of November, 1955, we were going to take the 2 per cent [fol. 253] cash discount off of the billing of Parke, Davis products. Further the purchases of Parke, Davis goods would no longer participate in deferred discounts. Or words to that effect.

Q. When you referred to the 2 per cent discount, putting you even with competition, to whom are you referring?

A. Well, of course, Parke, Davis, I guess, was giving 2 per cent off themselves, but my two competitors in this trading area were giving 2 per cent off.

Q. Was Parke, Davis giving 2 per cent off, also?

A. I believe they were but I would not know for sure.

Q. Do you include Parke, Davis as a company among your competitors?

A. Well, no, frankly, no.

Q. Doesn't Parke, Davis sell direct to the same retailers that buy from you?

A. Yes, but that, I guess, has always been and they are not alone in it. I have been in this business sixty years and we have been fighting that same thing right along with lots of them.

Q. They do sell to the same customers that you sell to?

A. Yes, direct. And, of course I do not even know the prices, or their bill out method or the discount, or any [fol. 254] thing else.

Q. But they tell you what prices you must charge? Isn't that right?

A. Well, they send out a catalog and in the front of that catalog they state their policy, and we maintain that policy. We bill out at those figures at which they show in the catalog.

Mr. Kenney: I will ask that this be marked as Government exhibit 17.

(Bulletin was marked Government exhibit 17 for identification.)

By Mr. Kenney:

Q. I will show you Government exhibit for identification No. 16 and ask you if this is the bulletin to which you referred.

The Clerk: Sorry, that is No. 17.

Mr. Kenny: No. 17, then.

The Witness: That is. That is practically what I just quoted there.

Mr. Kenney: I offer government exhibit 17 in evidence.

Mr. Goscil: No objection.

The Court: Received.

(The bulletin previously marked Government Exhibit 17 for identification was received in evidence.)

[fol. 255] By Mr. Kenney:

Q. Mr. Bradbury, after this visit of Mr. Dripps did you commence giving your customers the 2 per cent cash discount?

A. Yes, we did. We billed it out right at the time we made the sale, we took 2 off, because we do not have a cash discount in our setup.

Q. How long did you continue to give this cash discount?

A. I would not know except that it was quite a period.

Q. Well, did you at a later date have another conversation with Mr. Dripps on the question of discounts?

A. Yes, Mr. Dripps phoned me. I guess he called from Baltimore although I would not know, it could have been locally, and told me that he wanted us to discontinue giving that 2 per cent off at the time of billing.

Q. What did you tell him?

A. Well, I told him I would have to acquiesce but I would like to be able to give it back because I did not want to be at a disadvantage with my other two wholesale competitors in this trading area, but he said we are just going to add it to your profit, and he said, well, of course we can do that, and we did.

[fol. 256] Q. Do I understand that you do not consider Parke, Davis a competitor?

A. Well, we never thought too much about it. I mean, I, personally, have not. I realize that in substance, that is what it amounts to but since we suffer under that same kind of situation from several manufacturers in fact, I guess we might say many manufacturers

A. That is not the question I asked you, Mr. Bradbury. I would like to ask you again, do you or do you not consider Parke, Davis a competitor?

A. Well, I suppose they are in fact a competitor; if they sell the same people that we sell, yes, they are.

Q. And they set your prices?

A. That is right.

Q. And they also set your discount, right?

A. Yes.

Mr. Kenney: That is all.

Cross-examination.

By Mr. Gesell:

Q. How long have you been in the wholesale business, Mr. Bradbury?

A. Since October 3, 1898.

Q. Sixty years?

A. Sixty years, yes.

Q. How long have you been with the present company [fol. 257] the Wholesale Company, Washington Wholesale?

A. That is when I went to work there, October 3, 1898. That is 60 years.

Q. How long since that time has it been the practice of the Washington Wholesale not to sell to non-drug outlets?

A. Well, that has always been so, ever since we are owned and operated by retail druggists. I do not mean to say that we would refuse to aid something like—well, when the LaPlata School collapsed, I remember getting up in the dead of night and going down to the place of business and opening it up and getting several hundred tetanus anti toxin vials to take up——

Q. In an emergency?

A. Yes, like that, we can sell anybody anything.

Q. Sure, but for 60 years you have not sold to non drug outlets?

A. That is right.

Q. Now, Mr. Kenney asked you whether Parke, Davis set your prices.

Parke Davis suggests a minimum price at which you can resell to the retailers, does it not?

A. That is right, it is in the catalog, we follow that.

Q. And you follow that?

A. Yes.

[fol. 258] Q. You have no agreement with them about it; you just follow it?

A. That is right. They state their policy and we follow their policy that is in their catalog.

Q. And you know if you do not follow their policy, you may be cut off?

A. Yes.

Q. Now, I wanted to talk about these discounts for a minute; as I understand it, when Mr. Dripps called you the second time and talked to you about the cash discount of 2 per cent, he asked you to discontinue it and you did?

A. That is right.

Q. Didn't he tell you that the reason for that was that you were taking 2 per cent off your invoice for all your customers without knowing whether or not in each case the

customer had already given you enough cash to make it a true cash discount?

A. Well, that would be true of all our customers. They put up a deposit, they buy a share of stock for $600, it is assigned to the treasury of the corporation as collateral against their debt to the corporation. We always have their money.

Q. But you did not in each instance, before you took off the cash discount from your invoice, examine the state of [fol. 259] the account of the particular customer?

A. No.

Q. You just did it automatically?

A. That is right.

Q. And it was that that he objected to, was it not?

A. I think that was his objection on it, yes.

Q. Rather than to the granting of the 2 per cent discount if there was, in fact, cash available?

A. That is right.

I think that he did say that—well, I do not know just the conversation, but I got the idea that it was because we were taking it off of Parke, Davis items as we sold them, and not as we collected for them.

Q. That is right.

And, as it worked out, your members get all of this through the surplus account, both the participating dividend and the other; right?

A. Yes.

Mr. Gesell: Nothing further.

Redirect examination.

By Mr. Kenney:

Q. When you had this conversation with Mr. Dripps on the second occasion about the two per cent discount, did he not tell you that the way you were handling it put Parke, Davis at a competitive disadvantage?

[fol. 260] A. I do not recall his saying that.

Q. You do not recall his saying that?

A. I do not recall his saying that. His objection to it when I demurred and said that, after all, all our transactions were cash, he would not take that explanation to let

me continue on with taking the 2 off, but I do not recall his telling me that it put him in a bad competitive position. I do not think he did.

Mr. Kenney: Now, your Honor, I will have to announce surprise, although in a sense, I have been cross examining this witness anyhow. But I am surprised by his answer.

By Mr. Kenney:

Q. Didn't you tell me on an occasion when I interviewed you, that Mr. Dripps took the position that this 2 per cent cash discount gave you a competitive advantage over Parke, Davis?

A. I do not recall that, sir.

Q. You do not recall telling me that?

A. Beg pardon?

Q. You do not recall telling me that?

A. No, No, I do not recall telling you that.

Q. Don't you recall telling me that Parke, Davis was about your biggest competitor?

A. Oh, I believe that they do outsell us in our trading [fol. 261] area.

Q. Do you recall, sir, telling me that Parke, Davis was about your biggest competitor?

A. Well, I guess they are. I guess I did. Maybe I could have.

Q. You could have told me that?

A. Yes.

Q. Do you now recall that you did tell me that?

A. Well, I—I do not know whether I can—after all, it it was a good deal said and it was years ago. I do not—

Q. It was not years ago when you talked to me, was it, sir? You talked to me rather recently?

A. Oh, yes, that is true, we talked not too long ago, but if I am right about it, and you will know, I thought that you told me that Mr. Dripps told you that. But, maybe I am—

Q. And you do not recall telling me that that was true that the statement was made that that 2 per cent put Parke, Davis at a disadvantage?

A. Well, Mr. Kenney, I do not really remember that, but of course I could have.

Q. Well, we can agree, of course, that Parke, Davis is a competitor of yours?

[fol. 262] A. Yes, sir, that is right.

Mr. Kenney: O.K., Sir. That is all.

The Court: Any recross?

Mr. Gesell: No, your Honor.

The Court: All right, thank you.

(Witness excused.)

Mr. Gesell: Now, at this time I move to strike. There has been no testimony about cutting off any retailers, there has been no testimony about the subject matter of Count I whatsoever. This all relates to discounts in an earlier period; it is unrelated to any of the subject matter of this lawsuit that we have been going into.

The Court: The motion will be granted.

Mr. Kenney: Your Honor, I would like to be heard for a second on that.

The Court: Go ahead.

Mr. Kenney: I have a deposition here from Mr. Dripps which bears on this subject and I would like to offer it in evidence at this time and I would like, your Honor, if you would, to reserve your ruling to a time after you have had an opportunity to read it.

The Court: Very well. I will do that.

Mr. Kenney: The defendant has waived signature of the original deposition and this is a carbon copy, and I would [fol. 263] like to offer it in evidence at this time.

Mr. Gesell: I object to the deposition. Mr. Dripps is in court, he is not an officer. You cannot use the deposition under the rules.

The Court: You can't use the deposition if the witness is in court.

Mr. Kenney: I am not sure about Mr. Dripps, whether he is to testify in this case, sir.

The Court: Why don't you call him? You can ask that to impeach him if you want to.

Mr. Gesell: He is sitting right out in the courtroom now.

The Court: He is right here.

Mr. Kenney: I will defer calling him at this time.

The Court: All right.

Mr. Kenney: I would like a little more time to prepare for him.

And that is all we have today, sir.

The Court: Then you say you have more testimony tomorrow?

Mr. Kenney: Yes, sir.

We will have about four witnesses tomorrow and I think four to five, and that will wind up the Government's case. [fol. 264] The Court: Well, I guess that is about all we can do, Mr. Gesell.

Mr. Gesell: I guess so, your Honor.

The Court: Then we will adjourn until tomorrow morning at 10 o'clock.

Mr. Gesell: At the conclusion of the case, I am planning to make a motion to dismiss and I take it we may have time to argue that to your Honor tomorrow afternoon, if that would be your Honor's pleasure?

The Court: Well, if you need more time, we can have it on Tuesday, also. Because you will be out of town on Monday.

Mr. Gesell: I will be out of town on Monday.

The Court: You have a thorough argument on it?

Mr. Gesell: It did seem to us that possibly we could both take the transcript over that weekend and come in Tuesday morning, your Honor would have had the transcript also and we could come in Tuesday and have a full argument.

The Court: Yes, I have not seen the transcript of yesterday until it was put on my desk this noon. I have not had a chance to look at it.

Mr. Kenney: We did not get it until this morning, either.

Mr. Gesell: It was a little late for all of us this time, your [fol. 265] Honor.

Then we can follow that procedure and we will make the motion and argument Tuesday morning.

The Court: Yes.

Well, we will see the way the thing works out anyhow.

Mr. Gesell: All right.

The Court: Court will stand adjourned until 10 o'clock tomorrow morning.

(At 2:10 p.m. the trial was adjourned until 10 a.m., Friday, June 13, 1958.)

[fols. 266-274] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Transcript of Proceedings of June 13, 1958

The trial was resumed at 10:15 a.m. today, before Judge Joseph R. Jackson.

APPEARANCES:

For the United States: Mr. Edward R. Kenney, Mr. Herbert F. Peters, Mr. Marshall C. Gardner.

For the defendant: Mr. Gerhard A. Gesell, Mr. David B. Isbell.

[fol. 275] Thereupon PHILIP LEVIN, called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

Q. Your name is Philip Levin?
A. That is correct.
Q. What is your address, sir?
[fol. 276] A. 6743 13th Place, Northwest.
Q. And what is your occupation, Mr. Levin?
A. Vice President of District Wholesale Drug.
Q. And was that your occupation in 1956?
A. Yes, it was.
Q. What is the business of the District Wholesale Drug?
A. We are in the service wholesale drug business.
Q. Do you sell drugs of various manufacturers to drug retailers?
A. That is correct.
Q. Do you handle the products of Parke, Davis and Company?
A. We do.
Q. And were you handling these products in 1956 and for many years prior to that date?
A. That is correct.

Q. Do you know whether Parke Davis sells to the same retailers to whom your company sells?

A. Yes, they do.

Q. Do you know whether Parke Davis allows these retailers quantity discounts?

A. Do I know positively?

Q. Yes.

The Court: Do you know of your own knowledge?

[fol. 277] The Witness: Of my own knowledge, I think they do, sir.

By Mr. Kenney:

Q. Is your company allowed to give retailers quantity discounts on Parke Davis items?

A. We are not, sir.

Q. Are you familiar with the wholesale distribution policy of the Parke Davis company?

A. Yes, sir.

Q. I will show you Government Exhibit 13 and ask you if you recognize this as a statement of the Parke Davis wholesale distribution policy.

A. I do, sir.

Q. Could you tell us what this policy provides, as far as your company is concerned? (Handing exhibit.)

A. I am sorry.

Q. Well, strike that.

Does the Parke Davis company establish the prices at which you will sell its products?

A. They give us a suggested resale price, yes.

Q. Do they also tell you that if you do not follow this suggested resale price they will not sell to you?

A. No, they do not.

Q. Isn't that stated in the policy?

[fol. 278] A. Perhaps. I didn't read it too closely.

(The exhibit having been returned to the witness:)

That is correct.

Q. You have to observe their net resale price?

A. That is correct.

Q. Do you also observe the policy of selling only to recognized drug outlets?

A. That is correct.

Q. Have you ever heard of a Parke Davis policy on the wholesale level which says that you cannot sell to retailers who are cutting prices?

A. Have I ever heard of it?

Q. Have you ever heard of it?

A. Yes.

Q. Until the year 1956, had you ever heard of it?

A. No, sir.

Q. I will ask you, Mr. Levin, if to your knowledge Parke Davis has ever placed any restrictions on your distribution of their products.

A. Yes, they have.

Q. Can you tell us approximately when this was?

A. Sometime in the early summer of 1956.

Q. Did you at that time receive a visit from representatives of Parke Davis?

[fol. 279] A. That is correct.

Q. Could you identify those representatives?

A. No.

Q. Do you know the name or names of any of them?

A. No, I do not.

Q. Could you tell us how many representatives there were?

A. I believe three.

Q. And did they visit you, sir?

A. Yes.

Q. Did you have a discussion with them at this time?

A. Yes.

Q. Did they identify themselves as representatives of Parke Davis?

A. Yes, they did.

Q. And where did this discussion take place?

A. In my office at 52 O Street.

Q. Was anyone present representing District Wholesale other than yourself?

A. Just myself?

Q. Can you tell us what was said during this conversation with these representatives?

A. They asked me not to sell a group of retailers until a price situation was straightened out.

[fol. 280] Q. Did they name these retailers to you, sir?

A. Yes, they did.

Q. And could you tell us the retailers that were mentioned?

A. State Drug, McReynolds, Dart Drug, and I believe possibly Babbitt. I am specifically sure of the first three.

Q. Was Standard mentioned, to your knowledge?

A. Not to my knowledge.

Q. What did you tell them, sir?

A. I asked them if they were requesting it of me alone, or would they go to other wholesalers. And they said they would visit the local wholesalers. And then I agreed to abide by it.

Q. You agreed to abide by their request?

A. That is correct.

Q. Did you take any action as far as your own company was concerned, after this visit by the Parke Davis representatives?

A. Yes.

Q. What did you do, sir?

A. Well, it is a little—I know exactly what was done. Now whether I individually did it, or Mr. Estrin and I collectively did it, I am not too certain. But the action taken was this: We notified certain people in our place—a gentle- [fol. 281] man who was on the phone, and people picking the orders—that they were not to ship Parke Davis merchandise to these following people. And I personally informed State and McReynolds that we could not ship them.

Q. Did you give any instructions verbally to the members of your organization?

A. Yes, sir.

Q. You personally informed whom, sir?

A. State and McReynolds.

Q. State and McReynolds. We will get back to that in a moment.

Mr. Levin, can you tell me how the orders are put in by the local retailers here when they want supplies from District Wholesale?

A. Well, there are two means of getting orders. The bulk of the orders are received by daily phone calls from us to the customer. There is a possibility that a salesman going in could also sell merchandise of that nature; but that in itself is not too often.

Q. Approximately how many people do you have handling these telephone orders?

A. Eight.

Q. Is it possible that an order could have slipped through even after this visit by the Parke Davis representatives, to [fol. 282] one of the retailers mentioned?

A. Well, it is a possibility, of course.

Q. It is a possibility.

Now you discussed this situation with Mr. Estrin?

A. Yes.

Q. And who is Mr. Estrin, sir?

A. The president of our company.

Q. You testified that you had personally notified McReynolds.

A. That is right.

Q. Could you tell us to whom you talked at McReynolds?

A. Either Mr. Rodman or Mr. Pearlman. I am not too certain who. Probably Mr. Rodman. But I don't know.

Q. And this was after the visit of the Parke Davis men?

A. That is correct.

Q. Could you tell us what you told the McReynolds people?

A. I told them we could not ship them any Parke Davis Merchandise, until we were told we could again buy Parke Davis; that Parke Davis had asked us not to ship them.

[fol. 283] Q. And did you tell them the reason you couldn't ship them, as given by Parke Davis?

A. I believe I did, sir.

Q. To whom did you talk at State?

A. Leon Strauss.

Q. And did you give him the same message, Mr. Levin?

A. That is correct.

Q. Now to your knowledge did Mr. Estrin later receive a visit from representatives of Parke Davis?

A. I believe he did.

Q. Could you tell us at this time whether Mr. Estrin took any action after this visit?

A. Yes. To my knowledge he put out a bulletin to the people who should be informed about the matter.

Q. Now at this time, in the summer of 1956, Mr. Levin, could you tell us approximately how much business you were doing with McReynolds Pharmacy on a total basis?

Mr. Gesell: Do you mean in all products, or in Parke Davis?

Mr. Kenney: I said "on a total basis." I mean in all products.

Mr. Gesell: I don't see the materiality of that.

The Court: Overruled.

[fol. 284] The Witness: Shall I answer it?

The Court: Yes.

The Witness: About $55,000 a year.

By Mr. Kenney:

Q. And as to State Drug, could you tell us approximately the total volume of your business with that store?

A. Between $40,000 and $45,000 a year.

Q. Now could you tell us, Mr. Levin, after these visits to both you and Mr. Estrin, whether you received any orders for Parke Davis merchandise from the McReynolds Pharmacy?

A. Yes, sir; we did.

Mr. Kenney: Would you please mark this Government Exhibit for identification No. 18.

(Orders to District Wholesale from McReynolds were marked for identification as Government Exhibit 18.)

By Mr. Kenney:

Q. Mr. Levin, I am going to show you Government Exhibit for identification No. 18 and ask you if you can identify it (handing).

A. These are orders taken by us from McReynolds Pharmacy.

Q. Do those orders include requests for Parke Davis items?

[fol. 285] A. Yes, they do.

Mr. Kenney: I offer Government Exhibit for identification No. 18 into evidence.

Mr. Gesell: No objection.

The Court: It may be marked.

(The McReynolds orders to District Wholesale heretofore marked for identification at Government Exhibit 18 were received in evidence.)

By Mr. Kenney:

Q. Mr. Levin, can you tell me the approximate date or dates when these orders were submitted?

A. I can tell you the exact date. August 16th, 17th, 20th and 21st of August.

Q. Do you know what action was taken with regard to this order as far as the Parke Davis items are concerned?

A. They were marked "Out."

Q. Do you know of your own knowledge whether they were actually within the inventory of the District Drug Company at that time?

A. They were in inventory, sir.

Q. They were in inventory?

A. That is correct.

Q. Now I want to direct your attention to the latter part [fol. 286] of August and ask you if sometime during that period you had a further conversation with Mr. Estrin about these accounts to which you had been unable to sell.

A. It is possible. I don't quite understand.

Q. Well perhaps I can refresh your recollection a little bit and ask you if there came a time, toward the end of August, when you were again able to honor the orders of these drug stores.

A. Yes, sir.

Q. Do you know how that came about, sir?

A. I think Mr. Estrin simply told me that we could go ahead and ship them; that he was told so by someone in Parke Davis.

Q. By someone in Parke Davis.

Did you have occasion at that time to have a conversation with Mr. Haft of the Dart Drug Company?

A. Yes, I did.

Q. Do you know where this——

A. Yes; it was at our Christmas show at the Hotel Statler the last week in August.

Q. And what did you tell Mr. Haft at this time?

A. Mr. Haft told me, that beginning with the next day or two we would be able to ship him Parke Davis merchandise again; he felt that the price situation had been [fol. 287] straightened out.

Q. And to your knowledge were you able to ship him again after this meeting?

A. I think so. A day or two later I think Mr. Estrin told me we would be shipping him again.

Mr. Kenney: I pass the witness.

Cross-examination.

By Mr. Gesell:

Q. Do you recall now, Mr. Levin, the precise words you used when you spoke to the three Parke Davis representatives after they first visited your office?

A. The precise words I used?

Q. Yes.

A. You mean in reference to this question?

Q. When they came and asked you not to sell to certain of these retailers.

A. Yes. The one thing that did concern me, I specifically asked them if we were the only wholesaler who would have that request made. And they said no, they were visiting all three local wholesalers. And I said, "Well if that is the case, I will go along with whatever you suggest."

Q. And to the best you recall, those are the words you used? "I will go along with whatever you suggest."

[fol. 288] A. That is correct.

Q. I take it that Mr. Estrin is the boss of your company, is he?

A. That is correct, yes.

Q. And he is the man who makes the major contracts and policies of the company?

A. Yes, he is.

Q. You were asked whether when you called McReynolds and State—which I believe are the two companies—later on——

A. That is correct.

Q. —whether you gave them the reason for your not selling to them, and you said, "I believe I did."

A. That is correct.

Q. What did you say the reason was?

A. The Parke Davis people had requested us not to sell.

Q. What at that time was the volume of your business with, let us say, Dart Drug in Parke Davis products?

A. Well, let me put it this way. I would say nothing at all. There is a possibility there might have been one or two

small items that might amount to three or four dollars. But for all practical purposes, no volume at all.

[fol. 289] Q. And was that true with the other companies, too?

A. That is correct.

Q. So when you gave these large figures, your trade with these people was not in Parke Davis products but in goods of other suppliers.

A. That is correct.

Q. Now I take it for the present time, and for some time past, you have been selling to any and all retailers in the District of Columbia without any restrictions from Parke Davis of any kind?

A. That is correct.

Q. And you have been selling to Dart?

A. If he orders it, we sell it to him, definitely, yes.

Q. You solicit his orders?

A. That is correct.

Mr. Gesell: No other questions.

Redirect examination.

By Mr. Kenney:

Q. Mr. Levin, at the time of this first visit of the Parke Davis people, as I understand it, you verbally agreed to honor their request?

A. That is correct.

Q. Now you were sales manager as well as vice president [fols. 290-292] at this time, were you not?

A. That is correct.

Q. And you had something to do with the sales policy of the District Wholesale Drug Company?

A. That is correct.

Q. To your knowledge does Dart buy most of its Parke Davis products direct from the company?

A. That is my belief, sir.

Q. But you were willing to give up the account you had with McReynolds and State, at the request of Parke Davis?

A. The account we had with them? No, sir.

Q. You were willing to endanger that account by not dealing with them in Parke Davis products, even though their volume with you was small on that item?

A. It meant nothing, because we were not selling them Parke Davis products.

Q. But supposing they had not bought your other products, you would have suffered a considerable loss, would you not?

A. Well, I didn't assume that we would lose their other products.

Q. There was that possibility, wasn't there?

A. There is always a possibility, yes.

Mr. Kenney: That is all.

[fol. 293] Thereupon, DAVID I. ESTRIN, called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

Q. Your name is David Estrin?

A. David I. Estrin.

[fol. 294] Q. And your residence?

A. 7901 14th Street, Northwest, Washington, D.C.

Q. What is your occupation, Mr. Estrin?

A. President of the District Wholesale Drug Corporation, Washington, D. C.

Q. And can you tell us how long you have occupied that position?

A. Since 1939.

Q. Does the District Wholesale Drug Company handle the products of the Parke Davis Company?

A. It does.

Q. And have you so handled them for a number of years?

A. We have.

Q. Are you thoroughly familiar with the wholesale policy of the Parke Davis Company?

A. I am.

Q. Would you like to see it, sir, or do you think you are familiar enough with it to answer a question?

A. I think I am familiar enough.

Q. Is there anything in that policy which says that you cannot sell to a retailer who is cutting prices?

A. Specifically, I don't think so.

Q. Until the summer of 1956, had you ever heard that Parke Davis had such a policy?

[fol. 295] A. A policy that we could not sell to people cutting under list prices?

Q. Yes.

A. No.

Q. And as a matter of fact in 1956 you were selling to retailers in this area who were cutting prices, were you not?

A. We were.

Q. Now Mr. Estrin, in the summer of 1956, who was your assistant at the District Wholesale Drug Company?

A. In what category?

Q. Who was your sales manager and vice president?

A. Philip Levin.

Q. Did you have an occasion during the summer of 1956 to have a conversation with Mr. Levin concerning a visit which he had had from some Parke Davis representatives?

A. I did.

Q. Can you tell us approximately when this was?

A. Well, we had two visits, and I don't recall definitely whether it was the early part of 1956 or the late summer of 1956.

Q. Now on the occasion of the first visit to which you refer, you were not present, were you, sir?

A. That is correct.

[fol. 296] Q. Did Mr. Levin report to you what had taken place at this visit?

A. Yes, he did.

Q. Can you tell us, as best you can recall at this time, what he told you about this meeting?

A. He had a visit from several Parke Davis representatives, who requested us to not further sell to a particular list of customers.

Q. And were you given a list of those customers?

A. Verbally by him.

Q. A verbal list.

A. By Mr. Levin.

Q. By Mr. Levin. That is right.

Did Mr. Levin tell you the names of these stores at this time?

A. Yes, he did.

Q. Can you recall them?

A. Well, he mentioned a few. That was Babbitt, McReynolds, State, and Dart, as I recall.

Q. Was Standard mentioned?

A. I think so, but I am not sure whether it was at that time or on the second visit.

Q. Did Mr. Levin tell you what he had told these representatives?

A. He did say that he did question them whether other [fol. 297] wholesalers are to be visited with the same information, and he was told yes. And he was told that he would have to notify these people that they could not be sold, at the request of Parke Davis.

Q. Did Mr. Levin, to your knowledge, take any action after this visit?

A. He may have taken verbal action by informing several of the people who are order takers in our operation.

Q. Did these representatives advise Mr. Levin, to your knowledge, where these orders had come from?

A. I don't quite understand the question.

Q. Did they tell who was issuing the orders in the Parke Davis Company?

A. Well, if he did, he just mentioned the fact that several people representing Parke Davis visited him.

Q. He didn't mention that the orders came from Detroit?

A. I don't recall that he did.

Q. Now some time after this conversation with Mr. Levin, did you yourself receive a visit from certain Parke Davis representatives?

A. I did.

Q. Can you tell us approximately how long this was after [fol. 298] the first visit?

A. I think—and I am not very positive—it was some time in August of that year.

Q. And was this visit made to you?

A. Well not specifically to me. I happened to be in the office at the time.

Q. Were you alone at the time?

A. At the time, I was, yes.

Q. Do you know the names of any of these representatives who visited you in your office in August?

A. I am not certain; but I have a recollection of one named Cummings.

Q. One named Cummings.

A. I don't know the others.

Q. You had a discussion with these men at this visit?

A. They had a discussion with me, I should say.

Q. And what did they tell you, sir?

A. They practically reiterated the statements made to Mr. Levin, requesting that we limit sales of Parke Davis items upon request by the particular, listed customers, of which he mentioned the names—or they mentioned the names.

Q. And what did you tell them, sir?

A. I also asked them the same question, whether other [fol. 299] wholesalers are to be informed in the same manner. And I said, "If you wish me to do this, you know I will have to notify my customers that this action is going to take place; that we have been requested by Parke Davis to do so."

Q. And what did they say to that, sir?

A. The manufacturer's representatives, you mean?

Q. Yes.

A. That was satisfactory to them.

Q. Now after this visit did you take any action to inform the people working for you of what was to be done about this matter?

A. Yes. In routine manner I put a bulletin to our telephone order personnel listing the names as per the discussion with the representatives.

Mr. Kenney: Would you please mark this Government Exhibit for identification No. 19.

(Estrin order to personnel was marked for identification as Government Exhibit No. 19.)

By Mr. Kenney:

Q. Mr. Estrin, I show you what has been marked Government Exhibit for identification No. 19 and ask you if you can identify it (handing).

A. Yes. This was dictated by me.

[fol. 300] Q. This was the order you put out?
A. Yes, sir.

Mr. Kenney: I move Government Exhibit No. 19 for identification into evidence.
Mr. Gesell: No objection.
The Court: Mark it.

(The Estrin order heretofore marked for identification as Government Exhibit No. 19 was received in evidence.)

By Mr. Kenney:

Q. Did you personally notify any of these retailers that you were going to be unable to sell Parke Davis products to them after this time?
A. Yes, I called several of them.
Q. Can you tell me if you called Dart?
A. Yes, I did.
Q. And to whom did you speak?
A. Mr. Haft.
Q. And what did you tell him, sir?
A. That we had a visit from rep[illegible]ntatives of Parke Davis, and at their request we would not be able to supply him with Parke Davis items.
Q. Did you call Babbitt?
A. I did.
Q. And to whom did you speak at the Babbitt Company?
[fol. 301] A. Mr. Harry Babbitt.
Q. Did you give him the same message?
A. Yes, sir.
Q. Did you call McReynolds?
A. I don't remember calling McReynolds. As I recall, Mr. Levin spoke to them.
Q. Did you call Standard?
A. I may have. I think so.
Q. Do you recall speaking to Mr. Rosenthal?
A. Very likely.
Q. And you gave him the same message?
A. If I did, I did give him that message.
Q. Now, you called more drugstores than are listed on this exhibit, did you not, Mr. Estrin?
A. If you will let me see the exhibit again. I cannot recollect.

(Having been handed the exhibit:) I think I may have. Specifically, you don't have Babbitt on here.

Q. No; and I don't have Standard on there.

A. That is right.

Q. Were those two companies included in the list which was given to you by the Parke Davis representatives?

A. If I called them, they were included in the list. There was no list specifically, Mr. Kenney.

[fol. 302] Q. It was a verbal list.

A. A verbal list.

Q. It was a verbal list. Is that right, sir?

A. Yes, sir.

Q. Now some time after this visit, did you have occasion to have a telephone conversation with Mr. Dripps of Parke Davis?

A. I think I did.

Q. Did you call Mr. Dripps, or did he call you?

A. I don't remember definitely which way it happened.

Q. Do you remember approximately when the call was made?

A. It was a period after the visit. But I can't specifically give you a date.

Q. Would it be toward the end of August, to your present recollection?

A. It may have been, and it may have been later. I don't know.

Q. What did Mr. Dripps tell you during this telephone conversation?

A. Well, I don't know whether I had one or two conversations. So you would have to identify them for me.

Q. Well, the conversation that I am referring to took place at the end of August, when you were advised that you [fol. 303] could again sell these companies.

A. That is right.

Q. Now did Mr. Dripps tell you this?

A. Yes.

Q. And did he give you the reason why you could again start selling these companies?

A. I remember definitely he gave me a reason. But it is a possibility that——

Mr. Gesell: We don't want the witness' possibilities, Your Honor. The question called for the conversation.

The Witness: I don't remember any specific reason at this moment. I may have remembered my recollection of it, perhaps, at a previous——

By Mr. Kenney:

Q. But he did tell you that you could again start selling?

A. That is right.

Q. And did you personally take any action in notifying your accounts of this?

A. I don't know whether I called our accounts again personally. But I instructed our people that we were now permitted to take orders from these particular people who they were instructed not to take them from previously.

[fol. 304] Q. Since that time you have been selling to these accounts continuously, have you not, sir?

A. That is right.

Mr. Kenney: That is all.

Cross-examination.

By Mr. Gesell:

Q. You understood, didn't you, Mr. Estrin, that if your concern continued to sell these retailers whose names were given to you by the Parke Davis representatives, that you would be cut off and you would not be able to purchase Parke Davis products from Parke Davis?

A. I wasn't told that specifically, but I must have assumed that myself.

Q. That was the custom of the trade?

A. Yes. That is the custom of most manufacturers.

Q. And you felt that would happen to you if you didn't comply with their request?

A. I assumed. That was the custom.

Q. Do you recall your exact conversation with Mr. Haft when you called him, telling him you couldn't sell him?

A. Well, it might have been a general conversation. But the basic contents of the conversation was the fact that at the suggestion of Parke Davis we would not be able to sup-

[fol. 305] ply his immediate requests for Parke Davis merchandise.

Q. He testified in this courtroom that you referred to that list as "the blacklist." You didn't do that, did you?

A. That is absolutely untrue.

Q. Did you ever hear any Parke Davis representative refer to this as a blacklist?

A. No, sir. This is the first time I have ever heard that word used in conjunction with this case.

Q. Now as I understand what happened, after the first visit of the Parke Davis representatives who talked with your associate, Mr. Levin, he checked with you and the two of you decided that you would not sell to the retailers that have been mentioned.

A. That is correct.

Q. And it was you, really, who made these decisions——

A. That is right.

Q. —throughout this thing?

A. That is right.

Q. It is a fact, isn't it, Mr. Estrin, that during the period of July and August and September a number of orders were filled by your firm with McReynolds and with Dart and with State Drug?

[fol. 306] A. You are talking for Parke Davis items?

Q. For Parke Davis items.

A. I think our records may show that.

Q. May I refresh your recollection by referring you to these records? (Handing records.)

A. Yes, sir.

Q. They show items for McReynolds in July, August and September, do they not?

A. That is right.

Q. And similarly items for State in July, August and September?

A. I have that listed in my letter here, yes, sir.

Q. And items for Babbitt, Dart and Standard in this period?

A. That is right.

Q. These are correct representations of your records, are they not?

A. Yes indeed.

Mr. Gesell: May I have this sheaf of papers marked as Defendant's Exhibit 4 for identification?

(Sheaf of papers reflecting orders on District Wholesale Drug was marked for identification as Defendant's Exhibit No. 4.)

Mr. Gesell: No further questions.

[fol. 307] Redirect examination.

By Mr. Kenney:

Q. Mr. Estrin, you did issue instructions to your people that they were not to sell to these various drugstores? Isn't that correct, sir?

A. After the visit of Parke Davis.

Q. And it is possible, of course, that some orders did slip through?

A. Anything is possible.

Q. You have about eight telephone people taking these orders, do you not?

A. We do, yes, sir.

Q. Now I notice that Defendant's Exhibit for identification No. 3 groups the three months of July, August and September, 1956, in one group. Is that correct, sir?

A. I think so.

Q. Isn't it true that you did not actually order your people to stop selling these companies until August of 1956?

A. That is correct.

Q. So any sales that were made in July would have been made prior to the visit?

A. That is correct.

[fol. 308] Q. And there is no way of telling from these figures whether these sales were made in July, August or September?

A. Oh, I think there is a way of telling if the sales were made in August.

Q. Where is that, sir?

Mr. Gesell: Right on the exhibit, if you would like to have it, Mr. Kenney as to each company, the date, the product, and the day in August it was made.

By Mr. Kenney:

Q. Can you take this and tell us how much was sold in July of 1956, how much was sold in August, and how much was sold in September?

A. You are talking in terms of dollars?

Q. I am talking in terms of dollars and the number of orders that were sold to these drugstores, and which drugstores they were sold to.

A. Do you want me to read them, Mr. Kenney?

Q. Yes. I would like you to tell us the amounts.

A. All right. To McReynolds Pharmacy, as I see here according to our records, during July, August and part of September of 1956, we sold $149.98 worth.

Q. Now just a minute, Mr. Estrin. How much did you sell in July, sir, of 1956?

A. I don't have the breakdown at this moment, unless you [fol. 309] wish me to add it up.

Mr. Gesell: If Your Honor please, it is all scheduled on this, each item and the dollar amount. It just isn't added up.

Mr. Kenney: All right. I just want to explore this a little bit.

By Mr. Kenney:

Q. Isn't it true that as you look at this sheet, most of the articles were sold in July?

A. Well, there were 16 items sold in July for this account.

Q. Right. Now it was in the middle of August, was it not, sir, when you issued your instructions that these accounts were not to be sold?

A. That is right.

Q. And will you look and see if it isn't true that the first three articles sold in August were on the 6th and 7th of August.

A. That is right.

Q. And it was at the end of August when you had your conversation with Mr. Dripps when he said you could resume selling, was it not, sir?

A. It is very possible.

Q. And you will look and notice that the last sale of the five sales is the 29th of August? Isn't that correct?

[fol. 310] A. According to this record, that is right, sir.

Q. So your first three sales were on the 6th and 7th, you had one sale on the 20th, and the last was on the 29th?

A. That is right.

Q. And by the time September had come, you were able to sell freely to these accounts, were you not?

A. Yes. We were selling them regularly.

Mr. Kenney: That is all.

Mr. Gesell: No questions.

The Court: You may step down.

(The witness Estrin left the stand.)

Mr. Gardner: Mr. Phillips, please.

Thereupon WARREN DALE PHILLIPS, called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

Direct examination

By Mr. Gardner:

Q. Will you please state your name and address.

A. Warren Dale Phillips, 7605 25th Avenue, in Hyattsville.

Q. What is your present occupation, Mr. Phillips?

[fol. 311] A. Salesman for District Wholesale Drug.

Q. Directing your attention to the summer of 1956, where were you employed then?

A. I was employed inside of District's warehouse.

Q. For the District Wholesale Drug Company?

A. For the District Wholesale Drug.

Q. In what capacity were you employed there?

A. In the mornings I would take telephone orders from various retail drugstores, and in the afternoons I would handle the prescription service.

Q. Did the District Wholesale Drug Company handle Parke Davis products during this period?

A. Yes, sir; they did.

Q. In connection with your duties in receiving these orders, did you ever receive any instructions from any individual at the District Wholesale Drug Corporation as to any restrictions to be placed on the handling of these Parke Davis products?

A. Yes, I did.

Q. When was this, approximately?

A. As I recall, it was in August of 1956.

Q. Who issued these instructions?

A. As I recall, it was Mr. David Estrin.

Q. I hand you Government Exhibit No. 19. Are these the form of the instructions of Mr. Estrin?

[fol. 312] A. Yes, sir.

Q. And what is the substance of these instructions?

A. It is a memo from Mr. Estrin to certain departments, stating that all orders for Parke Davis merchandise requested by certain stores are not to be shipped under any circumstances.

Q. After seeing this memo, the Government Exhibit No. 19, did you thereafter receive orders from any of these stores for Parke Davis products?

A. Yes, sir; I did.

Q. What did you do when you received these orders, as far as the Parke Davis items are concerned?

A. We would mark them "Out of stock."

Q. I hand you here Government Exhibit No. 18. Can you state what this is, please?

A. These are invoices from District Wholesale Drug to McReynolds Pharmacy.

Q. Are there Parke Davis orders on those orders?

A. Yes, there are.

Q. I would like to direct your attention specifically to one page, which can be identified as invoice No. 16721. What is that page, sir?

A. This page is an order for McReynolds Pharmacy consisting of two items, one of which is a Parke Davis item.

[fol. 313] Q. What is that item?

A. The item is 2 x 100 Panterie tablets, 5 grain.

Q. Is that marked as being out of stock?

A. Yes, sir; it is.

Q. Do you know of your own knowledge at the time this was marked out of stock whether or not it was actually in the inventory of the Wholesale Drug Company?

A. Yes, sir; it was in inventory.

Q. Mr. Phillips, why did you mark it out of stock while actually it was in stock?

A. Because of the memo I had received from Mr. Estrin.

Q. After receiving this memo with the instructions from Mr. Estrin, did you at any time later have a conversation with Mr. Leon Strauss of the State Drug Company?

A. Yes, sir; I did.

Q. What did you say to Mr. Strauss during this conversation?

A. Mr. Strauss requested a Parke Davis item, and I advised him that I could not supply it, due to the memo I had received.

Q. Do you recall the name of the product he asked for?

A. Yes, sir. It was chloromycetin capsules.

Mr. Gardner: No further questions on direct examination.

[fol. 314] Mr. Gesell: No questions.

The Court: You may stand down.

(The witness Phillips left the stand.)

Mr. Kenney: Mr. Powers.

Mr. Gesell: Your Honor, before this witness is sworn, if I may interject for a minute. You will recall that Government Exhibit No. 6 was not very legible and we agreed to have typewritten copies made.

The Court: Yes.

Mr. Gesell: I would like to hand up to the Court a typewritten copy of that memorandum, which Mr. Kenney and I are agreed is the correct text. And I would like to suggest that perhaps we can take one of these carbons and clip it to the original exhibit in the Clerk's docket file.

The Court: Is there any objection?

Mr. Kenney: No objection.

The Court: All right. It may be done.

Thereupon Elliott Powers, called as a witness by counsel for the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

[fol. 315] Q. Your name, sir, is Elliott Powers?

A. Correct.

Q. What is your address, Mr. Powers?

A. 1510 Joppa Road, Riderwood, Maryland.

Q. What is your occupation, Mr. Powers?

A. I am the assistant branch manager of the Baltimore branch of Parke Davis.

Q. I can't hear you too well, sir. Would you try to keep your voice up just a little bit?

A. Yes, sir. I say I am the assistant branch manager of the Parke, Davis and Company Baltimore branch.

Q. And how long have you been employed by Parke Davis?

A. It will be 28 years in September.

Q. Can you tell us how long you have been in the Baltimore office?

A. I have been there since June or July of 1949.

Q. And are you the first assistant to Mr. Dripps for the Baltimore region?

A. I am the assistant branch manager. There is no other assistant branch manager.

Q. In other words, as far as the Baltimore branch is concerned, you are second in command. Is that right, sir?

A. That would be correct.

[fol. 315 a] Q. Mr. Powers, I want to direct your attention to the summer of 1956 and ask you if at that time you learned that there were certain drugstores in the District of Columbia which were selling Parke Davis products at prices below their suggested minimum.

A. Did I know?

Q. Did you learn of that?

A. In July, yes.

Q. In the summer of 1956.

A. Yes.

Q. Could you tell us how you learned of this, sir.?

A. I learned of it from complaints of our salesmen. I don't know that I can tell you of retailers, yes, I learned of it. I believe I was in Washington at the time and retailers complained about it.

Q. And did Mr. Dripps advise you that any of these things were taking place?

A. That what was taking place?

Q. This price cutting in the Washington, D. C. area.

A. Well I knew that.

Q. You knew it.

A. He didn't have to advise me of it.

Q. Was it your view that this pricecutting by retailers in this non-fair trade area was against the Parke Davis policy? [fol. 315-b] A. Yes.

Q. Was it your view that it was against the Parke Davis printed policy?

A. Yes.

Q. Can you tell us what part of the printed policy you have in mind when you say that it was against this policy?

A. Our policy has been stated for many years in the front of our catalog with regard to the fair-trade prices in fair-trade States, and we recommend that that same thing be carried out in areas where fair trade is not in effect.

Q. This is Government Exhibit 1 and this is the policy as listed in your catalog, is it not, sir? (Handing the exhibit.)

A. That is correct.

Q. Now that policy refers to the fact that these prices must be charged in fair-trade areas, does it not?

A. That is correct.

Q. And it says that they are suggested as prices that could be used in non-fair-trade areas?

A. That is correct.

Q. It doesn't make any statement that they have to be used by retailers in non-fair-trade areas, does it, sir?

A. No, sir.

Q. Now did it come to your attention in the summer of [fol. 315-c] 1956 that because a number of these retailers were selling at prices below the suggested prices they were cut off from obtaining Park Davis supplies?

A. Did it come to my attention?

Q. Yes, sir.

A. Yes, sir.

Q. You knew of it?

A. Yes, sir.

Q. Do you know which stores were cut off by Parke Davis at this time?

A. Yes, sir.

Q. Could you tell us which ones were, sir?

A. Dart, State, McReynolds; and I am not confident that Babbitt was ever cut off.

Q. Your are not confident that Babbitt was ever cut off?

A. I am not.

Q. What about Standard?

A. Standard, yes.

Q. And Standard operates both in Washington, D.C. and Richmond, Virginia?

A. Correct.

Q. And both places were cut off? Isn't that true, sir? Both locations?

A. Well, they buy through one location.

[fol. 315 d] Q. So their stores both in Richmond and the District of Columbia were affected?

A. Correct.

Q. Do you know approximately when it was that Dart was cut off by Parke Davis?

A. Approximately?

Q. Yes.

A. I believe it was around the 1st of July.

Q. Around the 1st of July in 1956.

And isn't it a fact, sir, that in addition to Parke Davis cutting off Dart, the wholesalers in this territory, including District, the Washington Wholesale Drug Exchange, and the H. B. Gilpin Company, were called upon and requested not to sell Parke Davis items to these accounts?

A. I understand so.

Q. Do you know that to be a fact, sir?

A. I know that they were asked not to do it.

Q. And isn't it a fact that each and every one of them cooperated with Parke Davis and refused to service these accounts?

A. I understand so.

Q. Now after Mr. Haft, with Dart Drug, had been cut off, did you have a number of telephone conversations with him?

[fol. 315 e] A. I was pestered with them.

Q. Can you tell us how often you were pestered?

A. It got very tiresome.

Q. I am sure it did, sir. Can you tell us about how often it got tiresome?

A. I don't know of any time it wasn't tiresome.

Q. It was tiresome to you?

A. Yes, sir.

Q. These calls generally were concerned with the fact that he was unable to get your supplies, weren't they?

A. That is correct.

Q. And he wanted to know how he could go about getting them, didn't he?

A. Correct.

Q. And that was tiresome to you?

A. Yes, because he had been told what we were doing, and that had been explained to him, but he kept calling.

Q. As a matter of fact, Mr. Powers, you told him that the Parke Davis policy that he was talking to you about was in writing in the catalog, didn't you?

A. That is correct.

Q. And it wasn't, was it?

A. It is the policy that you showed me.

Q. That is right; and it isn't in writing, is it?

A. As far as I am concerned, that is the policy that I [fol. 315 f] go by.

Q. Sir, did we not agree just a moment ago——

The Court: I think the thing speaks for itself.

Mr. Kenney: Well, I know, Your Honor; but this is important.

The Court: I know. Go ahead.

By Mr. Kenney:

Q. Now is it not a fact that a moment ago we agreed that there was nothing in writing in this policy to which you referred which said that a retailer in a non-fair-trade area had to observe these prices?

A. A retailer doesn't have to do anything.

Q. That isn't quite responsive, sir. Didn't we agree to that a moment ago?

A. The policy as we have it, Parke, Davis and Company has carried that out for many, many years.

Q. This policy here?

A. Yes.

Q. Which suggests prices that are to be charged in non-fair trade areas, but does not compel it.

A. We haven't had any problem until this came up.

Q. Now, Mr. Powers, isn't it a fact that Mr. Haft said to you, "Is this a new policy?" And you said, "Yes."

A. I don't recall making any such statement as that.

Q. You don't recall it?

[fol. 315-g] A. No.

Q. Do you recall him asking you to put the policy in writing?

A. Yes.

Q. And you said it was in writing?

A. In the catalog.

Q. And he said, "I am selling in a non-fair trade area." Isn't that correct, sir?

A. That is correct.

Q. But you took the position that this catalog covered that situation?

A. Correct.

Q. Now in addition to the fact that Mr. Haft and these other retailers had been told that if they didn't raise the prices they would not be sold Parke Davis items, isn't it a fact that they were also told that they must stop advertising these cut prices?

A. Yes.

Q. That is true. And you make no distinction, do you, Mr. Powers, between advertising of the cut prices and the actual selling at cut prices?

A. I don't quite understand your question.

Q. Well isn't it true, sir, that you thought that the advertising was very flagrant, because it was through this medium of advertising that the public was informed that they could [fol. 315-h] get these cut prices on Parke Davis products?

A. That is correct.

Q. In other words, you thought if you could control the advertising, you would help stabilize the price market in this area on Parke Davis products?

A. I felt this way, that it would take the bang out of it, or the so-called impetus that advertising was causing. We had no problem here with cut prices to any extent in the District of Columbia. And all of a sudden this fire broke out, and consequently it broke the thing wide open.

Q. Now you knew, before you had this trouble, that these companies were selling at cut prices, did you not?

A. I knew there were some cut prices in Washington.

Q. Yes.

A. But we never had any problem.

Q. You never had any——

A. I testified that before, sir.

Q. You never had any problem, because there was not widespread newspaper advertising?

A. That is correct.

Q. Isn't that right, sir?

A. That is correct.

[fol. 315 i] Q. And so it wasn't a problem. Isn't that correct, sir?

A. Correct.

Q. And you felt that—

A. We had no complaint from the retailers.

Q. Just a moment, sir.

A. Pardon me.

Q. I will ask the question.

Mr. Gesell: You can let him answer it.

Mr. Kenney: I think he has answered it.

Mr. Gesell: No. You have been interjecting on him, and he should be allowed to answer, if Your Honor please.

The Court: Did you complete your answer?

The Witness: Yes, sir.

By Mr. Kenney:

Q. May I ask, Mr. Powers, if as you testified you knew that they were cutting prices, and this was against Parke Davis policy, and it had been going on for some time, why didn't you take action on it prior to 1956?

A. We had had no complaint,

Q. That was because of the advertising. Isn't that right, sir?

A. We had had no complaint.

Q. Isn't it a fact, Mr. Powers, that you felt that if you [fol. 315 j] could control this advertising, you could help stabilize the price market here in the District of Columbia?

A. We can't control advertising. All we wanted these people to do was to stop their advertising.

Q. Well, I will put the question in a different form, sir, and ask you if it isn't a fact that you felt that if you could stop this advertising, you could help control the price situation on Parke Davis products in this territory.

A. Correct.

Q. Because the public wouldn't know about these cheap prices. Isn't that right, sir?

A. The advertising was demoralizing.

Q. Yes, sir.

A. And it was demoralizing to the other retailers, and they would refuse and they did refuse to buy our merchandise; as soon as these prices broke open, they said, "We are not interested in your merchandise, because it is cut price."

But up to that time, up to the time Mr. Dart started his flagrant advertising campaign, we had no problem. That is what I am trying to tell you, sir.

Q. Now, Mr. Dart—Mr. Haft—was not only advertising Parke Davis products, was he?

[fol. 315-k] A. That is right. But he had ours highlighted with a black line around it.

Q. He had the products of other manufacturers advertised too?

A. That is correct.

Q. But I am interested, sir, in the fact—and you have answered the question—that you felt that if you could stop this advertising, you could have some measure of control over the price situation.

A. Certainly.

Mr. Kenney: Your Honor, may we take a recess at this time?

The Court: Are you through with the witness?

Mr. Kenney: No, sir.

The Court: Are you nearly through with him?

Mr. Kenney: No, sir.

The Court: Then we will take our usual morning recess, for 15 minutes.

(Following brief recess:)

[fol. 316] By Mr. Kenney:

Q. Now, Mr. Powers, again directing your attention to the summer of 1956, is it not a fact that Mr. Dripps told you that he had given a list of retailers to wholesalers in Washington which these wholesalers could not sell Parke Davis products to?

A. I understood this.

Q. This was a verbal list?

A. Yes.

Q. They were advised of the names of these retailers?

A. Yes.

Q. Isn't it true that the Parke, Davis Company not only acts as a manufacturer but as a wholesaler as well?

A. Well, I would say we were a manufacturer, sir.

Q. Don't you sell to the same retail accounts that your wholesalers sell to?

A. Yes, sir.

Q. And don't you compete with your wholesalers in this respect?

A. Well, may I add something, sir?

Q. Yes, indeed.

A. I would think that the wholesaler is more of our competitor, because they can offer much better service, they can sell a twelfth of a dozen or a dozen.

[fol. 317] A. The wholesaler is in their store once or twice a week, he calls them every day on the phone, and we can not service customers that well.

Q. So the wholesaler is your competitor?

A. Did you want to say competition? I would like to look at it in that light, sir.

Q. Yes. Now is it not true that Parke, Davis gives quantity discounts to retailers who buy in large quantities?

A. That is correct.

Q. Is it not also true that your wholesalers are not permitted to do this?

A. That is correct.

Q. Now, sometime after the Dart Drug had been cut off, you have testified that you had a number of telephone conversations with Mr. Haft?

A. Yes, sir.

Q. Isn't it true that sometime toward the middle of July, after he had been cut off for a period of approximately two weeks, he told you that he would like to conform with your policy if you would again ship to him?

A. Yes.

Q. And he told you, if you would ship to him, he would agree not to cut your prices in ads in the newspapers?

[fol. 318] A. Well, I did not ask Mr. Haft to agree to anything.

Q. I am not using that as a nasty word, Mr. Powers. The

substance of the conversation was, sir, was it not, that, if you would sell to him, he would stop advertising?

A. That is correct.

Q. And you agreed to do this, did you not?

A. I told him that if he wanted to go along and play the game regularly and play the game according to the rules, we would be glad to ship him.

Q. And he said that he would?

A. That is right.

Q. And you again started to ship him at least to some extent?

A. Yes.

Q. Now, this went on for a period of approximately a couple of weeks, too, did it not, sir?

A. Yes.

Q. And then, is it not a fact that Mr. Haft called you and asked you if you were still selling to Peoples?

A. Yes.

Q. And you said yes?

A. Yes.

Q. And didn't Mr. Haft advise you that you were discriminating against him because Peoples, across the street [fol. 319] from him, had a sign in its window advertising your products at cut prices?

A. May I make an explanation?

Q. Yes, sir.

A. We were selling Peoples because, according to my information, they were going along on our policy.

Q. Yes, sir. Well, we will get to that in a moment, Mr. Powers.

But, is it not true that before you talked to Peoples Haft complained to you that they were advertising in the store across the street from him?

A. Yes.

Q. And you told him that, if this were so, you would see Peoples and try to get them in line?

A. Correct.

Q. And you did go and you talked to Mr. Downey of Peoples, is that not correct?

A. Correct.

Q. This would have been toward the end of July of 1956, would it not?

A. In that period.

Q. Now, it was sometime along that period of July or early August, perhaps, of 1956?

A. I think probably, yes.

[fol. 320] Q. You had a conversation with Mr. Downey of Peoples, did you not?

A. Correct.

Q. Can you tell us what position Mr. Downey occupies with Peoples?

A. I believe he is vice president.

Q. Does he have anything to do with sales to your knowledge.

A. I do not know. I am not quite sure. But he may be vice president in charge of promotion.

Q. Well, now, you told Mr. Downey at this meeting, did you not, Mr. Powers, that you noticed that Peoples were cutting prices?

A. Yes.

Q. And you told him, did you not, that it had been the Parke, Davis policy for many years to do business only with individuals that maintained the scheduled prices?

A. I told Mr. Downey that we had a policy in our catalog, and that anyone that did not go along with our policy, we were not interested in doing business with them.

Q. Despite the fact that Peoples was in a non fair trade area in the District?

A. That is correct.

Q. And your catalog does not say that they have to sell [fol. 321] at your suggested prices?

A. It makes the suggestion, sir.

Q. That is right. It does not set out specifically in a non fair trade area that they must sell at these prices, does it?

A. Only what it says.

Q. That is right, sir.

Now, Mr. Downey told you on the occasion of this visit, did he not, that Peoples would stop cutting prices and would abide by the Parke Davis policy, is that right?

A. That is correct.

Q. Isn't it true, he told you that?

A. Yes.

Q. Is it not true, also, Mr. Powers, that at the time of this

visit with Mr. Downey, not all of the Peoples Drugstores in Washington, D.C., were cutting prices?

A. I could not answer that.

Q. Well, do you have any recollection at all of that, sir?

A. There is something vague in my mind but I can't give you——

Q. Would you like me to refresh your recollection?

A. Yes, if you choose to.

Q. You testified before the Grand Jury that investigated [fol. 322] this situation sometime ago, did you not, sir?

A. Yes, sir.

Q. And during your testimony—and, your Honor, I am using this only to refresh the witness' recollection—I asked you if all of the Peoples Drugstores were cutting prices, and you said, "I do not think so; I don't know for sure."

I am reading from page 402.

"The conversation which you had with them came about as a result of the fact that the drugstore opposite Dart was cutting prices, isn't that correct?"

And you said, "That is correct."

Now, does that refresh your recollection any, sir?

A. Well, sir, you must understand that Peoples operates in Virginia and the surrounding area here, and I do not think they were cutting prices there.

Q. Virginia at this time was also a non fair trade area, was it not?

A. I think the Fair Trade had been broken at that stage.

Q. And the District of Columbia was never a fair trade area?

A. To my knowledge.

[fol. 323] Q. Now, you knew, did you not, Mr. Powers, that among these other retailers Standard was one of the chain drugstores who were cutting your prices?

A. Correct.

Q. Did you have a conversation with Mr. Rosenthal of Standard about this situation?

A. Yes, sir.

Q. And what did you tell Mr. Rosenthal?

A. I told Mr. Rosenthal that I understood they were advertising cut rate prices and that we had a policy that we would like to do business with them, that if they wanted to go along on our policy, maintaining our schedule and ceasing

advertising at cut prices, unless they did want to do that the only thing we felt we could do would be to discontinue doing business with them.

Q. And Standard would not go along with you, would they, sir?

A. Mr. Rosenthal said "I don't know that I could do that, Mr. Powers."

I said, "That is perfectly all right; that is up to you. You can make your own decision what you want to do."

And, if I remember correctly, I believe he called me back and said that they wanted to run their business and we could run ours.

[fol. 324] Q. And then you cut them off?

A. Yes.

Q. Now, is it not true that you also know that the wholesalers in the Richmond area were asked not to sell to Standard Drug?

A. Yes, sir.

Q. And they were asked by Mr. Cummings, is that right, sir?

A. I understand so.

Q. Now, I want to direct your attention, Mr. Powers, once again, to this so called policy that we have been talking about. Is this policy still in effect, to your knowledge?

A. It certainly is in effect wherever there is fair trade.

Q. Is it still in effect in non-fair trade areas?

A. We have not had any problem that I know of except here, and I am only familiar with what is going on here.

Q. Is it in effect here?

A. Well, apparently it is not because we are selling those people.

Q. And, as far as you know, it is still in effect in the other non fair trade areas in the rest of the country?

A. I could not tell you that. I do not know.

[fol. 325] Q. You do not know, sir?

A. No.

Q. Now, I want to direct your attention, please, to the end of August, and I will ask you if, at that time it is not a fact that a number of retailers in this area had been cut off and were unable to secure Parke-Davis products for a period of several weeks?

A. The only ones I am familiar with are those that you have mentioned.

Q. Yes. Now in addition to Peoples agreeing to abide by your policy, is it not a fact that the Drug Mart group had also agreed—

Mr. Gesell: I must object to that question. There has been no testimony that they agreed to abide by anything.

The Court: Sustained. Say what each one of them did.

By Mr. Kenney:

Q. In addition to the conversation you had with Mr. Downey and the straightening out of this situation as it refers to Peoples, do you know whether Drug Mart, the Drug Mart group, started observing your policies in the summer of 1956?

A. May I ask—say that once more, please, so that I will understand what you want to know.

Q. Well, we have been discussing your visit with Mr. [fol. 326] Downey. Now, in addition to that, sir, did you personally ever talk to anyone representing the Drug Mart group?

A. Yes, sir.

Q. And who was this?

A. Mr. Schulman.

Q. And do you know whether this group of which Mr. Schulman was a member were abiding by your policies, so called, in the summer of 1956?

A. They were not at one time.

Q. They were not at one time?

A. In other words, Mr. Kenney, they had advertised prices to meet Dart.

Q. Yes, and didn't they later conform with your policies and stop this advertising?

A. Yes.

Q. Do you know approximately when that was?

A. Well, I think, sir, that probably their last ad, as I recall, in talking the matter over with Mr. Schulman, he told me that they had an ad in the works and that it would be a matter—that ad would run and they would probably not run any more, and that must have been late July or the first of August, somewhere in there.

Q. In 1956?

A. Correct.

[fol. 327] Q. And, to your knowledge, is it not true that for quite a long period of time after that, Drug Mart, as a group, did refrain from advertising Parke Davis products?

A. I think so, sir.

Q. That is correct.

Now, as to the drugstores that have been cut off—I refer to McReynolds, State, Standard, Dart—and you say you are not sure of Babbitt's?

A. No.

Q. —isn't it true that at the end of August they had been unable to obtain Parke Davis supplies for a number of weeks from either Parke-Davis or the wholesalers in this area and in Richmond, to your knowledge?

A. To my knowledge, that is right.

Q. Now, I will direct your attention to the end of August, and I will ask you if you, in company with Mr. Dripps, on the 28th day of August, 1956, visited the offices of Mr. Haft?

A. Yes, sir.

Q. You learned at that time, sir, did you not, that the Department of Justice was investigating this situation?

A. Yes, I knew it before that, though.

Q. You knew it before that?

A. Yes, sir.

[fol. 328] Q. Do you know whether Mr. Dripps knew it before that?

A. No.

Q. But you did?

A. I had been told.

Q. Could you tell us who told you?

A. Yes, sir.

Q. Who?

A. Mr. Green.

Q. Mr. Green?

A. Mr. Green.

Q. Who is Mr. Green, sir?

A. Mr. Green formerly worked for us and he is now working at that time he was working for Babbitts.

Q. And he told you this?

A. That someone—

Q. You did not pass this information on to Mr. Dripps?

A. I do not think so. It was only hearsay that I heard.

Q. Yes.

A. And then Mr. Green mentioned that someone had inquired about me. I took it no further. I do not know that I said anything to Mr. Dripps. I could not answer that.

Q. All right, sir. But in any event, you, personally, knew [fol. 329] at that time that your company was under investigation by the Department of Justice?

A. I understood so.

Q. And at the time of this visit to Mr. Haft you were told by Mr. Haft that the man who had just left his office prior to your entrance was Mr. Story of the Anti Trust Division?

A. I don't know who the name was. He said it was an FBI man or Department of Justice man, or someone.

Q. Yes. Now, did Mr. Haft know that you intended to visit him on this day — and I refer to the 28th of August?

A. Do you mean in advance?

Q. Yes, in advance?

A. No, I called him, myself.

Q. Here, locally?

A. Yes.

Q. You came over from Baltimore and you gave him a call from a local station here?

A. Correct.

Q. And told him you were coming to see him?

A. Yes. He said he would be glad to see us.

Q. Now, you had a conversation with Mr. Haft at this time, did you not?

A. Yes.

[fol. 330] Q. And will you tell us what you recall that conversation consisted of as far as what was said to Mr. Haft and what was said by him?

A. Well, I think I have already testified on the Grand Jury that I do not believe I said a half a dozen words in the interview.

Q. Yes. Do you know what Mr. Dripps said and what Mr. Haft said?

A. Mr. Haft did most of the talking. And we have no axe to grind with anyone, as long, as I mentioned awhile ago, if we play the rules.

Q. Will you please confine your answer at this time to that conversation?

A. Yes, sir. I will try to. I cannot repeat anything definitely as to any part or all of the conversation.

Q. I understand that. Just the substance.

A. The substance was that it came out in the end, that I can say Mr. Haft suggested, he said, "What if I stop my advertising, take down my signs, and sell at any price I want to?"

And Mr. Dripps replied, and I can remember this, he said, "Well, that is something that might be worth exploring."

Q. Now, this had been explored before by you, had it not?

[fol. 331] A. Beg pardon?

Q. This business of Haft stopping his advertising is something that had been explored by you on a previous occasion?

A. To a degree, sir.

Q. Well, isn't it true, sir, that in the middle of July, Haft told you that he wanted to abide by your policy, that he would stop advertising if you would again ship to him, and you did?

A. That is correct.

Q. So this was not a new thing in the sense of a proposal that came out of the blue?

A. Well, no, I could not say that it was completely new. I could not say that it had been actually attempted. We were attempting to put out the fire that had been started. We were doing everything that we could to rectify the situation.

Q. And you were trying to put out this price war, or these low cut prices, as you call it, in the District of Columbia and in Richmond?

A. Correct.

Q. Now, Mr. Powers, was anything else said on the occasion of this visit on the 28th of August?

A. With Mr. Haft?

Q. Yes.

[fol. 332] A. Yes, Mr. Haft made one statement that I recall. He said possibly if we can get this thing settled, we might call the Department of Justice, might get this thing delayed.

Q. Mr. Haft said that?

A. I understood so, yes, sir.

Q. And what did Mr. Dripps say to that?

A. I don't recall that he made any comment.

Q. Well, when you left, you and Mr. Dripps, after this conversation, did you know at that time that you were again going to ship to Haft? Or was it left in the air?

A. I don't know. I don't know that Mr. Dripps knew at all, because our next call, we made two more calls after that.

Q. We will get to the calls, sir. But this is all you presently remember of this visit with Mr. Haft?

A. Yes, sir.

Q. You had this conversation and then you left? And where did you go when you left?

A. We went to see Mr. Strauss at State.

Q. And what did you tell Mr. Strauss?

A. Mr. Dripps talked to Mr. Strauss. I did not hear all of the conversation that I can remember. But I believe it was something of this order; that we had talked with Haft, that he had suggested stopping advertising, would take down his [fol. 333] signs, and that he possibly would sell at cut rate, but it would take the impact, as far at we were concerned—and that there was a possibility we could straighten it out, would they want to go along on such a policy as that or such a plan?

Other than that, I cannot say exactly what transpired.

Q. Did Mr. Strauss give you any indication either way as to whether that was acceptable?

A. Well, yes, it was acceptable.

Q. It was acceptable to Mr. Strauss?

A. Yes.

Q. Then after leaving Mr. Strauss did you visit McReynolds Pharmacy?

A. Yes.

Q. Did you talk to both Rodman and Perlman there?

A. Yes.

Q. Can you tell us what was said at this visit now?

A. Well, that is two years ago, and you are asking me to remember words that are difficult to remember. It was in essence the same thing as I have told you here.

Q. Did you indicate to McReynolds, that is, to Rodman and Perlman, that Dart had said that it would not advertise? Did you indicate that to them?

A. In our conversation?

[fol. 334] Q. Yes.

A. I think so, yes.

Q. And didn't they tell you that, "Well, that was all right with us, if Dart would not advertise, we are interested in doing business with you and we will take our signs out of the windows."?

A. Yes.

Q. And they said, "We still want the right, however, to sell for whatever we want to inside of the store"?

A. I do not think they made that statement.

Q. They did not say that?

A. I do not believe so.

Q. Well, isn't it true that they were permitted to continue selling at whatever price they wanted to inside of the store?

A. They have been.

Q. They have been?

A. Yes.

Q. Now, isn't it true, Mr. Powers, that these deals, or these conversations which you had with Mr. Haft and Mr. Strauss and Mr. Rodman amounted to an abandonment of your policy?

A. It amounted—I do not know; you could say an abandonment in a sense. But it was our effort to get some order out of chaos.

[fol. 335] Q. There was certainly an abandonment as far as the District of Columbia and Richmond were concerned, was it not?

A. Well, it was attempting to rectify the situation that had gotten deplorable.

Q. Now, to your knowledge, after the 28th of August, when you had visited these retailers, did Mr. Dripps advise the wholesalers, both here and in Richmond, that they could again start selling to these retailers?

A. State that once more, please.

Q. Well, after this visit, when you made this visit to these various retails on the 28th of August, to your knowledge did Mr. Dripps later communicate either then on that date or very soon thereafter with them and state they could again start selling to these retailers?

A. Well, that was a question that was very vague in my mind, and in the Grand Jury testimony, I felt as I remembered, that we had gone home. But I thought about it and

office and I think Mr. Dripps called one account here in Washington, to my knowledge, and I believe that was Mr. Allen.

Q. Mr. Allen?

A. Yes.

[fol. 336] Q. You do not recall whether on this particular day, he called District Wholesale Drug?

A. I do not know, sir.

Q. But you did learn later that all wholesalers both here and in Richmond were notified they could again start selling?

A. Yes, sir.

Q. At the time these wholesalers were told originally they must not sell to these accounts, were they also told if they did they would be cut off by Parke, Davis?

A. I did not hear the conversation, but that was the idea. They assumed they would be, I am sure.

Q. You do not know whether they were actually told that?

A. I was not there.

Mr. Kenney: May I have a second, sir?

The Court: Yes.

Mr. Kenney: I will pass the witness, your Honor, at this time.

The Court: Cross-examine.

Cross-examination.

By Mr. Gesell:

Q. How long did you say you had been with the company, Mr. Powers?

A. It will be 28 years in September.

[fol. 337] Q. Now, back a few years before 1956, it is a fact, is it not, that Parke Davis sold the wholesalers at the same price it sold retailers?

A. Correct.

Q. And if a retailer wanted to buy from a wholesaler, he had to pay more for his product buying it from the wholesaler than he did buying it from Parke, Davis, did he not?

A. That is right.

Q. And then there came a time when there was a change in the policy?

A. That is right.

Q. And the wholesalers were given a discount?

A. That is right.

Q. So that they could sell at the same price as Parke, Davis and make a profit?

A. That is right.

Q. And when was that?

A. 1947.

Q. What was the reason for that change?

A. May I make an explanation?

Q. Surely.

Q. With fair trade, listing an item at a dollar, the fair-trade price is 10 per cent off of list which makes it sell for 90 cents.

[fol. 338] The trade discount is 40 per cent. So it costs the dealer 60 cents. He sells it at 90 and he makes what is commonly known in the trade as 33⅓ per cent mark-up.

We made our policy in 1947 so that any retailer in the country could make a fair, legitimate profit on the resale of our merchandise.

Up to that time, before then, a dealer bought a product from the wholesaler, he bought it at 30 off list or a dollar item for 70 cents, and he sold it for 90 cents. So, he was making far less than the fair trade mark-up. So we felt that our policy in 1947, of giving the retailer the opportunity to buy in small quantities at any time, with service from the wholesaler, was a service to him.

Q. There have been retailers that you have found you did not want to sell to, either because of the volume of their business, or the frequency of their purchases or anything of that kind?

A. Correct.

Q. And you had from time to time refused to sell to various retailers?

A. That is correct.

Q. Now, it is also a fact, is it not, that over the years that you have been with Parke, Davis, Parke, Davis has [fol. 339] refused to sell to retailers who were price cutters?

A. Yes, we have.

Q. Not only these instances in 1956, but at other times?

A. That is right. I can't give you an exact example. But we try to keep our merchandise in legitimate channels.

Q. You remember cases of that kind when you have refused to sell?

A. Yes.

Q. You have also refused to sell to wholesalers?

A. Yes.

Q. What is meant by diverting goods? Do you know that expression?

A. Yes. And it is one of our problems. It is the merchant or the individual that wants to buy large quantities of your goods at a discount, and then, instead of using it for his own purpose, he lets it flow into channels outside of the drug trade or those people that feel that they are getting an extra deal.

Q. And where you have found that one of your customers was diverting products, you have refused to sell, is that not right?

A. Correct.

Q. And I suppose you have refused to sell for credit [fol. 340] reasons and other reasons of that kind?

A. Yes.

Q. Now, you referred to the fact that the advertising by two or three of these stores in the newspapers, in the summer of 1956 here in the District, of deep, cut prices, I think you used the word—that it had disruptive effects on the trade?

A. Yes.

Q. What did you mean by that?

A. I mean by that I have worked Washington in the past and I know that the dealers feel that any cut-price advertising, without the advertising, it loses its impact: And with the cut-price advertising, it demoralizes our ability to work with the retail drug trade and have him promote our goods.

Q. Now, that is what I want you to explain.

Let's take a small pharmacist out in my neighborhood, in Georgetown, the District of Columbia. You are familiar with Georgetown, are you not?

A. Yes.

Q. Now, how does the advertising of cut prices affect business in advertising by some other——

Mr. Kenney: I object to that for two reasons: One, it call for a conclusion, and the other, it is irrelevant.

[fol. 341] We are concerned with the fact Parke, Davis cut off certain retailers.

The Court: Overruled.

Mr. Kenney: May I have a continuing objection to this line of questioning, sir?

The Court: You may.

By Mr. Gesell:

Q. You may answer, Mr. Powers.

A. A man in the retail drug business has a certain overhead that he must meet and it must have a reasonable profit. Certain operators want to sell at deep cut prices, they then take advantage of merchandise that has a good customer acceptance and they splash it all over the newspaper and the customer, of course, saves some money. But the sad part of it is that they use our merchandise for scenery, and they push off-brands on which they make a far greater profit——

Mr. Kenney: Your Honor, I object to that, too. That is a statement of conclusion by this witness.

The Court: I know it is. But I think it is in the record through Mr. Haft, himself.

Mr. Gesell: It is.

The Court: The objection is overruled.

Mr. Kenney: I would like to know, sir, how he knows this.

[fol. 342] Mr. Gesell: You will have a chance to examine him in due course.

The Court: All right.

By Mr. Gesell:

Q. Now, Mr. Powers, how does one of your customers who is not selling at cut prices and who has been promoting your goods at the mark-up you have talked about, what does he do when that price-cutting happens?

A. Well, while he would like to go along with us and he feels that he should do it on price, if he is forced to meet these prices, he buys the cheaper brands and tries to meet the competition.

Q. And he no longer deals in Parke-Davis products?

A. He loses interest in our products, of course.

Q. He no longer pushes them to the front of his shelves, isn't that right?

A. That is right.

Q. Now, how many retail pharmacies are there here in the District of Columbia, or were there? Let's say in 1956, how many were there? We have been talking about these four or five. How many are there in this town, approximately?

Mr. Kenney: I object to this line of questioning, too. It is completely irrelevant.

The Court: Your blanket objection covers it. It is [fol. 343] overruled.

The Witness: I would say there are probably—you say where?

By Mr. Gesell:

Q. In the District of Columbia.

A. I would say 260 or 270.

Q. And how many in Richmond, approximately?

A. I would say close to 100.

Q. Now, Mr. Kenney asked you whether instances of price-cutting by retailers had come to your attention. Did Parke-Davis have some kind of a regular system of shopping stores and sending in agents and spies to find out what prices were being charged in these stores?

A. We maintain no policing system whatever.

Q. You had no card index file?

A. No, sir.

Q. No system of regular reports by salesmen?

A. No.

Q. Most of the price-cutting that came to your attention, then, would be advertised price cuts in the newspapers?

A. Correct.

Q. Or an occasional report from a salesman?

A. And complaints from the trade, as our salesmen called on them.

[fol. 344] Q. Now, Mr. Kenney asked you whether Mr. Haft had telephoned you and you said that he had called you, he had pestered you, he was tiresome, or words to that effect. Do you recall that?

A. Yes, sir.

Q. Mr. Haft would call you at the office?

A. He even called me at my home.

Q. And how often would he call?

A. I don't know. I have forgotten.

Q. Would you say three times, five times, ten times a week?

A. Oh, I would say possibly during the period it was—I could not answer that—maybe 8 or 10 times.

Q. In the two weeks after July 3rd?

A. Yes. I really, I could not give you an exact accounting.

Q. Isn't it a fact the first time you heard about the Department of Justice entering this picture was in these telephone conversations you had early in July with Mr. Haft?

A. Yes, sir.

Q. What did he say to you about that?

A. Well, he said that, he implied that it was against the Anti-Trust laws and that he had friends in the Justice Department.

[fol. 345] Mr. Kenney: He did not mention my name, did he?

The Witness: No.

Mr. Gesell: You are not under examination now, Mr. Kenney.

By Mr. Gesell:

Q. And you heard as early as July that the Anti-Trust Division was looking into this matter?

A. I understood so.

Q. And neither you nor Mr. Dripps made any changes in the policy of the company, did you?

A. No.

Q. You went ahead with your plans with respect to refusing to sell to certain wholesalers and to certain retailers did you not?

A. Yes.

Q. Mr. Haft has testified in this proceeding among other things—

Mr. Kenney: I object to this form of questioning. Can't he ask a question without telling him what Mr. Haft testified?

The Court: I think this is cross-examination.

Mr. Kenney: Even so, sir?

The Court: Go ahead. I overruled your objection.

By Mr. Gesell:

Q. Mr. Haft testified in this proceeding among other [fol. 346] things, Mr. Powers, that when you and Mr. Dripps came in to his office at the end of August, the second time that advertising was discussed, that Mr. Dripps said that the reason he was there was because of the Anti-trust investigation. Is that true or false?

A. That is false.

Q. Now, you were asked about your conversations with Mr. Downey, that you said were in either late July or early August, I believe. Did you make any agreement with Mr. Downey?

A. Never.

Q. You simply told him that you would refuse to sell him if he continued to advertise or charge cut prices, right?

A. Correct.

Q. Now, what did Mr. Downey say to you?

A. He said, "Do you mean that you would cut us off?"

I said, "Well, according to our policy, that is the only thing we could do, Mr. Downey."

Q. What did he say?

A. He said, "Well, I see no reason why we can't go along with it."

But, he says, "We can't sit here forever and let this man demoralize everything."

But, he said, "We will go along with your plan."

[fol. 347] Q. Now, you were also asked about your discussions with Drug Mart, which you said, the best you could fix it, was the latter part of July or early August?

A. Yes.

Q. And you referred to talking to a Mr. Schulman?

A. Yes.

Q. Do you recall that you also talked to a Mr. Schoket?

A. Yes.

Q. Who is Mr. Schoket?

A. He is, I believe, a partner of Mr. Schulman.

Q. Is he active, also, in Drug Mart?

A. I do not know how active. But I think they are, in fact.

I am quite certain in my mind that they are a member of the Drug Mart.

Q. Did you talk to Mr. Schoket about Drug Mart?

A. I *told* to him about the chaotic condition that was in the City, about cut prices, yes.

Q. Do your remember, also, talking to him about the resale premium plan?

A. Yes.

Q. And was that the latter part of July or early August?

A. Sometime in that area.

[fol. 348] Q. Will you tell us what conversations you had with Mr. Schoket, relating to Drug Mart, on that subject?

A. We have what is called a resale premium which is allowable to the sales personnel for the promotion of merchandise, and this check or this money is paid by Parke, Davis and Company to the clerks, and Mr. Schoket, we were under the impression he wanted the resale premium but not for the purpose of paying the sales people. We said it is intended for that purpose solely, and that if he wanted to use it otherwise, as a discount which we are not able to show it as a discount, in fact we have no means of doing it that we were not interested in selling it to him on that basis.

Q. And didn't he tell you at that time that if he could not pocket the premium payments, himself, he was not interested in promoting your goods?

A. He said there was not enough profit.

Q. Mr. Schoket was buying for Drug Mart, was he not?

A. I understood that he had purchased one order for them, yes.

Q. And it was in that connection that you were discussing this?

A. Yes.

Mr. Gesell: I have no further questions.

Mr. Kenney: I have some further questions.

[fol. 349] Redirect examination.

By Mr. Kenney:

Q. Mr. Powers, I am interested in the way you figure the profit and the mark-up of drug products. Now, you say if a customer buys something from you for 60 cents and sells it for 90 cents, it is how much of a mark up?

A. 33⅓.

Q. Not a 50 per cent?

A. You are figuring it on cost.

Q. Yes, I am.

A. But they deal on retail markup of the selling price.

Q. If I bought an article from you for a dollar and sold it for two, you would call that only a fifty per cent markup, would you?

A. Yes.

Q. I would call it a 100 per cent markup, but you are figuring the markup 50 per cent.

A. Well, modern merchandising figures profit on the resale price.

Q. Yes, but as a practical matter, sir—you and I have taken arithmetic—weren't you taught in school, if you bought something, in fact, for a dollar and sold it for two, you would making a 100 per cent profit?

[fol. 350] A. That is an error in merchandising. Percentage-wise, yes. But profit-wise, all retailers deal on markup at selling price. The way you arrive at it, you take your selling price and divide it into your profit.

Q. I understand that exactly, sir.

The Court: Are you through with your answer?

The witness: Yes, sir.

Mr. Kenney: I thought he was.

The Court: All right.

By Mr. Kenney:

Q. That is a fictitious way, actually?

A. That is accepted in the trade.

The Court: Is that the general practice in merchandising?

The Witness: Yes, sir.

Mr. Kenney: But as a practical matter

The Court: What difference does it make?

Mr. Kenney: Well, your Honor, I think

The Court: This is the matter of dealing in the trade. I have taken the same kind of arithmetic as you. If you get something for one dollar and sell it for two, I make 100 per cent. That is not the way they work.

Mr. Kenney: We have heard talk about low markups, low [fol. 351] selling prices and so forth, and I am trying to show it is not so low the way they figure their markup.

The Court: Go ahead, then.

By Mr. Kenney:

Q. Now, you testified when Mr. Gesell was examining you, that Parke, Davis has in the past cut off a number of retailers for various reasons, is that right, sir?

A. Yes, we have refused to sell them.

Q. Now, have you in every instance that this has happened, solicited and enlisted the support of the wholesalers to assure that these retailers do not get your products?

A. Well, at that time, the time I was thinking about, sir, the wholesaler, it cost them more money through the wholesaler, anyway, if they did buy it.

Q. I know, sir. But I am asking you if it is a fact—or is it not a fact, did Parke, Davis enlist the support of the wholesalers every time they cut off a retailer?

A. It was not necessary, because the people that were trying to buy from us at a better price, the wholesaler's price, did not amount to anything to them. In other words, that is what I was trying to say to Mr. Gesell, that there are certain dealers who wanted to divert our merchandise.

[fol. 352] Q. I am not sure you have answered my question.

A. I would like to answer anything you want to know.

Q. Let me just ask you this: Do you know or do you not know whether, in these instances that you testified about Parke Davis has cut off these retailers, have they gone to the wholesalers and said, we do not want you to sell these retailers?

A. I could not make that statement.

Q. You do not know?

A. I do not know.

Q. Now, when you say chaotic conditions that existed in this territory during the period when you are talking about, do you mean there was a lot of heavy price competition in the sales of drugs, is that right?

A. On the sale particularly of our products, particularly what we call over the counter products, borderline products, those that are started and eventually reach the stage of where the customer goes in and buys them.

Q. They were the subject of heavy price competition?

A. That is correct.

Q. Now, is it not true that these retailers that we have been discussing who were advertising your products were also advertising the products of other drug manufacturers? [fol. 353] A. Yes.

Q. Do you know whether Parke, Davis' total sales in this area have fallen off to any extent during 1956 and 1957?

A. I could not answer that. I could say this, that I would not think they would because of the population increase.

Q. Well, to your knowledge, they have not fallen off, is that right, sir?

A. That is correct.

Q. Now, this Drug Mart group consists of thirty independent drugstores, or approximately that number, does it not, sir?

A. I do not know how many it is.

Q. During the summer of 1956 you knew that the Drug Mart represented quite a large group of Drug stores, did you not?

A. It represents a number of independent retailers, yes.

Q. Now, Parke, Davis ordinarily services its retailers on the question of taking orders. That is the retailers who buy direct from Parke, Davis, right?

A. Yes.

Q. Don't you have your salesmen call at these stores periodically and quite regularly, to look over the inventory of your accounts, make a note of what they need and send [fol. 354] the orders to you?

A. That is right.

Q. Now, these salesmen are in these retail drugstores quite often, are they not, sir?

A. It is according to the value of the account how often the salesman wants to call on them.

Q. And these salesmen are well aware of the fact and were in 1956 that your products were being sold at cut prices by certain drugstores?

A. Yes.

Q. And they were aware of that fact in 1955, were they not?

A. I have tried to say, Mr. Kenney, that we had no prob

lem here before 1956. There may have been an occasional cut price.

Q. Yes.

A. There may be one occasionally in the newspaper. But it caused us no problem. We had no complaints.

Q. Well, as far as you are personally concerned, Mr. Powers, did any of the salesmen, say, during this period of 1955, when these same stores were selling at cut prices, call this to your attention, if you can recall?

A. I do not recall that we had any problem in 1955.

Q. Well, in 1956, some of your salesmen started reporting these cut prices, did they not?

[fol. 355] A. Yes.

Q. And they reported the advertising, which was very disturbing?

A. Yes.

Q. Now, when Mr. Haft called you on all of these occasions, both at the office and at home, he was doing his best to try to get you to sell him Parke, Davis?

A. I was doing my best to help him play according to the rules and I wanted to do everything I could to help him.

Q. Well, he was doing his best to persuade you to sell him, was he not?

A. Apparently so.

Q. Now, you testified that you knew of this investigation by the Department of Justice early in July, is it possible that you would have known it at that time and Dripps would not have known it until the 28th of August?

A. I could not tell you what Mr. Dripps knew. I do not know.

Q. You do not ever remember telling him about it?

A. I do not think I did. I do not know.

Q. You are his assistant but you never advised him of this?

A. I do not know about that. In fact——

Q. Do you know, sir, do you know that the reason this [fol. 356] policy was abandoned was because, partially at least, of this anti-trust investigation?

Mr. Gesell: I object to that. What policy is he talking about?

Mr. Kenney: The policy of not selling at these prices——

The Court: Are you asking him if he knows?

Mr. Kenney: Yes, I asked him if he knew.

The Court: If you know, say so.

The Witness: I do not know.

By Mr. Kenney:

Q. When you went to call on Mr. Downey, you solicited his support of Parke, Davis policies, is not that right?

A. That is right.

Q. And he said, I will abide by your policy?

A. That is right.

Q. Can you tell us when the Parke, Davis Company started paying the so-called promotional money, or "push money"?

A. I could not give you that exact date. It has been a number of — let's see; I would say probably in the early fifties.

Q. Now that promotional money is payable to retailers only on sales to the retailer by Parke, Davis, isn't that true? [fol. 357] A. That is right.

Q. Do you know whether all of these stores that buy direct from you give this promotional money to their clerks?

A. I am sure all of it is not given to the clerks. For example, a man that operates a store, if he does the selling, he is entitled to the money.

Q. Well, don't you know, sir, that even at this present time, Peoples' drugstores does not give this money, promotional money to Clerks?

A. I do not know that. They did.

Q. They did?

A. Yes.

Q. Until they started cutting prices?

A. I do not know about that.

Q. Well, you do not know at this time at least, do you, sir, whether they do or not?

A. No.

Mr. Kenney: That is all.

Mr. Gesell: One question.

The Court: All right.

Recross-examination.

By Mr. Gesell:

Q. The thirty-three and a third per cent markup is used [fol. 358] by the retail pharmacy for the purpose of meeting his overhead, making a decent margin of profit and promoting the goods of the supplier, isn't that right?

Mr. Kenney: Well now, your Honor, I will have to object.
The Court: Overruled. Answer the question.
The Witness: That is correct.
Mr. Gesell: No further questions.
Mr. Kenney: No further questions.
The Court: The Court will recess now until 1:45 p.m.

(At 12:18 p.m. the trial was recessed to resume at 1.45 p.m.)

[fol. 359] AFTERNOON SESSION

1:45 p.m.

The Court: You may proceed.
Mr. Kenney: Mr. Dripps, please.

Thereupon, SAMUEL DRIPPS, called as a witness by counsel for the United States and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kenney:

Q. You name, sir, is Samuel Dripps?
A. Yes.
Q. And what is your address, Mr. Dripps?
A. 10 St. Michaels Way, Baltimore 12, Maryland.
Q. Your occupation?
A. I am a salesman.
Q. Well, are you a sales manager for Parke Davis in the Baltimore territory?
A. I am.

A. Virginia, West Virginia, District of Columbia, Maryland, Eastern Pennsylvania, Southern New Jersey and Delaware.

Q. You have been employed by Parke Davis for what length of time?

[fol. 360] A. About 21 years.

Q. How long have you been in the Baltimore area as sales manager for this District?

A. Since March 1st of 1954.

Q. Now, are you the senior representative of Parke Davis in this area?

A. I would say so, yes.

Q. Assigned here on a full-time basis. As such, Mr. Dripps, is one of your duties to keep your customers advised of your policies?

A. Where I feel it necessary.

Q. Where you feel is necessary. If you don't feel it necessary you don't advise them, is that correct, sir?

A. I believe that is true.

Q. Can we talk a minute about your wholesale policy? You are thoroughly familiar with it?

A. I hope so.

Q. You are familiar with the printed catalog version of the wholesale policy?

A. I believe so.

Q. And that says, does it not, that your wholesalers must observe your resale prices or you will not sell to them?

A. If that is what is printed, that is my interpretation of it.

Q. I thought perhaps you knew, Mr. Dripps. I will show [fol. 361] you a copy of it. I believe you will find it says you will deal only with wholesalers who observe your resale prices.

A. It doesn't say anything about resale prices, Mr. Kenney.

Q. It doesn't? What does it say about prices, if anything?

A. "Parke, Davis wholesale drug billers trade price list and its supplements."

Q. Isn't it a fact that this says that you will deal only with wholesalers who observe your net price ceiling schedule?

A. That's right.

Q. In your wholesale billage price?

A. That's right.

Q. And also that you will sell only to wholesalers who confine their distribution to customers authorized by law to dispense prescriptions?

Now, in addition to that printed wholesale policy, Mr. Dripps, is there an unprinted policy?

A. I don't know whether there is a policy or not. There is an accepted custom.

Q. How long has this accepted custom been in existence?

A. To the best of my knowledge, since I have been with Parke Davis, 21 years.

Q. Is that accepted custom that the wholesalers will not [fol. 362] sell to retailers to cut prices?

A. I presume so.

Q. Well, do you know, sir?

A. I have always accepted it that way.

Q. You have always accepted it that way. Does it also mean that that applies in fair trade and non-fair trade areas, both?

A. That is my present interpretation.

Q. That is your present interpretation. Was that your interpretation back in the spring of 1956?

A. By "spring" what do you mean?

Q. Well, let's say prior to June of 1956.

A. No, it was not.

Q. As a matter of fact, at that time you didn't know there was any other accepted customary policy other than that expressed in the catalog, did you?

A. Well, I knew that we had followed the policy in fair trade areas.

Q. But you didn't know that it applied to non-fair trade areas?

A. That's correct.

Q. And it was your understanding that you could not compel wholesalers in non-fair trade areas to stop selling to price-cutting retailers?

A. I can't say that it was my understanding. I did not [fol. 363] know that we could.

Q. You did not know? Now, Mr. Dripps, as to the resale policy, you were familiar with that, or you are, aren't you?

A. I hope so.

Q. Do you want to see the policy itself?

A. Please.

Q. As I understand it, the Parke, Davis retail policy, as it is expressed in that catalog there, states that the prices in the catalog are to be charged by retailers in fair trade areas, is that right, sir?

A. Yes.

Q. And it is suggested that they also be observed by retailers in non-fair trade areas?

A. That's right.

Q. It does not say "retailers in non-fair trade areas must observe these prices," does it?

A. It does not say that.

Q. And as a practical matter you did not know there was any Parke Davis policy which said that retailers in non-fair trade areas had to observe those prices until June of 1956, did you?

A. I asked the question at a later date.

Q. You didn't know in June of 1956, then, is the right?

[fol. 364] A. I wasn't sure that we could at that time.

Q. So naturally, since you did not know the entire wholesale and retail policy, as we now understand it, you weren't in a position to advise your wholesaler and retailer customers in this area about this policy, were you?

A. I didn't feel that I had this position.

Q. You didn't advise them, did you?

A. I did not.

Q. And, as a matter of fact, the wholesalers in this area had been for some time selling to retailers who were cutting prices, had they not?

A. To the best of my knowledge.

Q. And retailers cutting prices in this area had been doing so for some time prior to the summer of 1956, isn't that true?

A. Again, to the best of my knowledge, they had.

Q. Now, how did you learn about this policy, Mr. Dripps?

A. Through a meeting held in Detroit.

Q. Will you tell the Court, please, how this knowledge that you acquired came about?

A. It was a managers meeting and during the open forum I asked the question of the General Chair what could be done about the situation that existed in Washington, D. C., and Mr. Walker said, "To what situation do you refer?"

and I told him the price cutting situation that existed in [fol. 365] Washington and which I had discussed with him at a previous occasion. And at that time Mr. Loind interjected the question, "Do we not have a policy covering that situation?"

So, Mr. Walker said, "We do." And I said, "Are you familiar with the fact that Washington, D. C., is not a fair trade area?" And Mr. Loind said, "It isn't a question of fair trade. Our attorneys tell us that we have the right to select our own customers and refuse to sell to those we choose." He said further that we should either have the courage to follow our policy or the guts to discontinue it.

Q. Now, this was your first understanding that there could be such a policy of Parke Davis as it regards non fair trade areas?

A. That's right.

Q. That was in June of 1956?

A. I think it was.

Q. Now, who is Mr. Loind?

A. The President of the Parke, Davis Company.

Q. Did he tell you it was perfectly all right for you to go to your wholesalers and enlist their cooperation in seeing that these price cutters weren't supplied with Parke Davis goods?

A. He said nothing other than what I have indicated.

Q. He didn't say that you should go to the wholesalers.

A. He said we should either enforce our policy or discontinue it.

[fol. 366] Q. And that policy was not to sell to price cutting retailers?

A. That was my interpretation.

Q. Now, at this time, and at the present time, Mr. Dripps, is it not a fact that Parke Davis acts as both a manufacturer and wholesaler?

A. I don't know whether you might classify us as wholesalers or not. We are distributors.

Q. Isn't it a fact that you sell on a wholesale price level to the same retail customers that your wholesaler distributors sell for?

A. You mean at essentially the same prices?

Q. Yes.

A. That's correct.

Q. So, to that extent, you compete price wise with your wholesalers?

A. To some extent.

Q. Now, Mr. Dripps, after this meeting did you take some action to see to it that this policy was enforced?

A. I did.

Q. Did you discuss this situation with Mr. Cummings?

A. I did.

Q. Can you tell us now who was Mr. Cummings at this time?

A. Mr. Cummings was field manager in that area.

[fol. 367] Q. Was there another man here named Fagen?

A. Yes.

Q. Who had equal responsibility with Mr. Cummings?

A. He had equal responsibility; not equal duties.

Q. And served different stores?

A. That's right.

Q. Did you tell Mr. Cummings to contact these price cutting retailers and tell them if they did not observe your prices they would be cut off?

A. I believe I did.

Q. Did you also tell Mr. Cummings if the retailers refused to go along and observe your prices he should approach the wholesalers in the Washington, D. C., area and in Richmond, Virginia and tell them if they sold to these price cutting retailers they would be cut off?

A. I told him to instruct the wholesalers, whether or not the retailers indicated their willingness to abide by our policy.

Q. Instructed him to go to the wholesalers and say, "We don't want you to sell to these price cutting retailers"?

A. That's right.

Q. Did you also tell Mr. Cummings you did not wish to put this policy in writing?

A. I don't remember specifically; I might have.

Q. Is it possible that you did?

[fol. 368] A. It is possible.

Q. Now, at this time these particular retailers were not only cutting prices but they were advertising at these cut prices, isn't that so?

A. Yes.

Q. And in this advertising, this bothered you considerably, did it not?

A. I can't say that the advertising bothered us any more than the general price cutting.

Q. As a matter of fact, you didn't differentiate between the two, did you, Mr. Dripps?

A. I don't believe so.

Q. You regarded one as bad as the other?

A. Yes.

Q. And the advertising, of course, was the means of getting the knowledge to the public that it could obtain Parke Davis products at cut prices?

A. Yes.

Q. Now, did Mr. Cummings report back to you after you had this original conversation with him and told him to contact the retailers and the wholesalers?

A. I can't remember specifically an instance, but I am certain that he must have.

Q. Well, you learned later, didn't you, that a group of these retailers refused to accede to your request?

[fol. 360] A. Yes, I am sure.

Q. And you also learned that the wholesalers had gone along with your request and were refusing to sell to these retailers?

A. Yes.

Q. You know, as a practical matter, that a number of retailers were cut off from direct buying as far as Parke Davis is concerned?

A. That's correct.

Q. And that included Dart Drug?

A. Yes.

Q. And it included Standard?

A. Yes.

Q. It included Babbitt's, did it not?

A. To the best of my knowledge, yes.

Q. It also included McReynolds?

A. Yes.

Q. And State?

A. Yes.

Q. Any others?

A. Not that come to me immediately.

Q. And you also knew at the time, did you not, sir, that

certain retailers who had been approached had indicated that they would abide by your policy?

A. To what period do you refer?

[fol. 370] Q. The summer of 1956.

A. Do you mean before we approached the five specific customers?

Q. Let me put it this way: Isn't it true that after Dart, we will say, had been cut off, he complained to your office that you were discriminating against him because you wouldn't sell to him and yet, Peoples across the way was advertising on their windows, Parke Davis products at cut prices, and yet, you continued to sell to them?

A. Mr. Powers indicated that he had talked with him. He did not talk to me about it, as I remember.

Q. Did Mr. Powers indicate to you that Peoples had said they would abide by your policy?

A. I don't believe he did at that time.

Q. Well, you know as a practical matter, Mr. Dripps, that at one point in the summer of 1956 Peoples was advertising your products at cut prices?

A. I believe that is so, but not in a general way.

Q. Isn't it true that some time during August they stopped advertising and they also stopped cutting the prices on Parke Davis products?

A. I suppose that the ads would show that. I am not sure, Mr. Kenney.

Q. I was asking you, Mr. Dripps, if you had any knowledge of the fact that Peoples did stop cutting prices after [fol. 371] this one ad?

A. I am not clear on Peoples. I couldn't honestly say to you whether they did or did not.

Q. As a matter of fact, don't you know that Peoples stopped cutting prices at this time and continued selling at list prices until January of 1957?

A. To the best of my knowledge, we never had any real concern with Peoples. They hadn't caused any great amount of trouble.

Q. They were observing your prices, though, particularly after this visit Mr. Powers paid to Mr. Downing?

A. I am not sure we had any trouble before Mr. Powers visited him.

Q. You know you didn't have any trouble after that, though?

A. That's right.

Q. Until 1957?

A. (Affirmative nod.)

Q. Now, after you cut off Dart Drug, Mr. Dripps, you received a number of phone calls from Mr. Haft, did you not?

A. I believe so.

Q. And during these phone calls he would ask you if you would resume shipping to him?

A. I presume he did, yes.

[fol. 372] Q. And you told him you would not, isn't that right, sir?

A. I believe, Mr. Kenney, I told you once before that I had very little conversation with Mr. Haft. Most of his conversations were with Mr. Powers.

Q. You did converse with Mr. Haft?

A. On an occasion or two, yes.

Q. Didn't you, on one occasion, tell Mr. Haft that you wouldn't put this policy, that we are discussing, in writing?

A. I believe I did.

Q. When did you first meet Mr. Haft, Mr. Dripps?

A. The day I called in his store, August 28, 1956.

Q. Is that the first time you had talked to him?

A. In person?

Q. Yes.

A. Yes.

Q. Had you talked to him on the phone prior to that time?

A. Possibly; I don't remember specifically, but I would say I probably had.

Q. Do you remember the first time you ever talked to him in any regard on the telephone?

A. No.

Q. You didn't know him very well, is that it, sir?

[fol. 373] A. I didn't know him at all.

Q. Now, after the 3rd of July, isn't it a fact that Dart and a number of other retailers, including Standard and the ones I have named, could not buy direct from Parke Davis for a period of several weeks?

A. Yes.

Q. And they could not buy from the wholesalers in this area or in Richmond, Virginia, either?

A. Presumably.

Q. You know that to be true, don't you?

A. I believe the record indicates they did buy in isolated instances.

Q. Yes. You know they were requested not to sell and in each case went along with the request and did not sell, don't you, sir?

A. They indicated they would follow our policy.

Q. Now, it may be that some orders slipped through, but they intended to follow your request, isn't that right?

A. I believe so.

Q. This went on for a period of several weeks in the summer of 1956?

A. Yes.

Q. Now, I want to direct your attention to the 28th of August in 1956 and ask you if, at that time, you and Mr. [fol. 374] Powers visited Mr. Haft?

A. We did.

Q. Did you learn, for the first time on the occasion of that visit, that the Department of Justice was investigating this situation which you had created here?

A. I did.

Q. That was your first knowledge of it?

A. Yes.

Q. As a matter of fact, at the time you paid a visit to Mr. Haft there was a Department of Justice man with him, wasn't there?

A. He said there was.

Q. He didn't know that you were coming, did he, Mr. Dripps?

A. You mean prior to that date?

Q. Yes.

A. We called him, as Mr. Powers indicated this morning.

Q. On that morning. And did you tell him that you came in to discuss this entire situation with him?

A. You mean the fact that he was not being permitted to buy from us?

Q. Yes.

A. Yes.

Q. And what was said, other than that, during this con-
[fol. 375] versation?

A. Do you have some particular point you would like to make? I do not recall the exact conversation.

Q. I would like to know, did you suggest to him that if he would stop advertising you would again sell to him?

A. It indicated to you once before, Mr. Kenney, it was Mr. Haft's suggestion, not mine.

Q. Let me ask you this: Did he give you his word he would not advertise?

A. I don't know whether he did or not. He suggested that there was an avenue which we had not explored. I asked him what he had in mind and he explained this suggestion as it has been brought out in this Court.

Q. Now, you hadn't had any experience with Mr. Haft prior to this, at all, you say?

A. That's right, personal contact. You are talking about personal contact?

Q. Yes. But isn't it true that earlier in the spring, in March of 1956, you had discussed with Mr. Haft the question of his advertising and selling at cut prices?

A. I don't know, Mr. Kenney.

Mr. Kenney: May I have Government's Exhibit No. 15?

By Mr. Kenney:

Q. I am going to show you Government's Exhibit No. 15 and ask you to read it to yourself. Then I will ask you a question about it.

[fol. 376] (Pause.)

A. It is quite possible, Mr. Kenney, that I refer to, in the letter, specifically that in keeping with your suggestion, I indicated that I hadn't informed him. It is quite possible that I did not do it in person.

Q. You say also, here, "He tells me."

A. Yes.

Q. So, it is possible that you did talk to him?

A. It is possible that I did, yes.

Q. But at this particular time all you knew of Mr. Haft was that he was a price cutter and had refused to go along with your policy, is that right, sir?

A. (Affirmative nod.)

The Court: You will have to answer audibly. This goes down in writing. Speak just a little louder.

The Witness: I am very sorry.

By Mr. Kenney:

Q. Did he pay his bills promptly?

A. To the best of my knowledge he did.

Q. As far as you know, was he a man of his word?

A. As I said, I didn't know him.

Q. Isn't it true that on the 25th of August he promised you he would not cut prices and he kept that promise?

A. Well, I don't know whether you would call it a promise or not. He indicated that was a possibility.

[fol. 377] Q. He gave you his word, didn't he?

A. He said that he would like to explore that possibility and I called him back and told him it was acceptable to our Company.

Mr. Kenney: Would you mark this Government's Exhibit for identification No. 20?

(Letter Sept. 25, 1956 was marked for identification as Government Exhibit No. 20.)

By Mr. Kenney:

Q. Mr. Dripps, I am going to show you what has been marked Government's Exhibit No. 20 for identification, and ask you if that is your signature that appears on that letter?

A. That is.

Q. Is that a letter you wrote?

A. It is.

Mr. Kenney: I offer Government's Exhibit No. 20 into evidence.

Mr. Gesell: No objection.

The Court: It may be received.

(Letter heretofore marked for identification as Government Exhibit No. 20 was received in evidence.)

The Witness: I would like to call attention——

Mr. Kenney: Just a moment, sir, I will ask you to read this letter.

The Court: Is that this little one?

[fol. 378] Mr. Kenney: Yes.

The Witness: I have read it.

Mr. Kenney: I want him to read it into the record.

The Witness: In reading this letter I would like to call your attention to the fact that this letter was written on September the 25th. You asked me whether or not I knew, on August the 28th, whether he was a man of his word.

By Mr. Kenney:

Q. I also asked you if he did not give you his word on the 28th of August that he would not advertise cut prices.

A. Apparently he did.

Q. This letter refers to that, doesn't it?

A. I assume it does.

Q. Would you read it into the record?

A. (Reading):

> "Just a note to tell you it is a pleasure to do business with a man of his word. Good luck to you."

Q. As far as your personal experiences with Mr. Haft are concerned, he always kept his word, didn't he?

A. I believe so.

Q. Now, on this same day that you had this conversation with Mr. Haft, you also visited the State Drug Store, didn't you?

[fol. 379] A. We did.

Q. You and Mr. Powers talked to Mr. Strauss?

A. We did.

Q. Did you tell Mr. Strauss about your conversation with Mr. Haft?

A. I am sure we did.

Q. And did you suggest to him as long as Dart wasn't going to advertise that if he wouldn't you would again sell to him?

A. I didn't ask him whether or not. I mean, our talk with him was not dependent on Haft's action.

Q. It wasn't?

A. No. I told him what happened at Haft's and told him

if the management of our Company accepted that as an interpretation of our policy he would be expected to follow our policy to the same extent as was Haft, and all others, no more or less.

Q. The same extent as the others?

A. That's right.

Q. You didn't tell him at that time about the conversation with Haft, about the stopping of the advertising?

A. It is possible. I don't remember exactly what transpired.

Q. Well, from there, then, sir, you went on to the McReynolds Pharmacy, didn't you?

[fol. 380] A. Yes.

Q. You talked to both Mr. Rodman and Mr. Pearlman?

A. If I may make a minor correction; I don't think it is important, but I believe the procedure was reversed. McReynolds first and then State.

Q. Let's take McReynolds now, Mr. Dripps. Will you tell us about your conversation with Mr. Rodman and Mr. Pearlman?

A. Essentially the same as the one with Mr. Strauss.

Q. Did you mention to Mr. Rodman and Mr. Pearlman that Dart was going to stop advertising?

A. I mentioned to them his suggestion.

Q. And did you suggest to them that if they would also go along with this policy you might again sell to them?

A. I repeat, I told him the same as I had Mr. Strauss, if the Company interpreted that as complying with our policy they would be expected to abide by it in the same way.

Q. Now, after this meeting with State and McReynolds, did you contact and communicate in any way with the wholesalers in the District area here?

A. Well, in some way I am sure. Whether I did it or not, I do not know.

Q. You know they were advised either on that day or very shortly thereafter that they could again sell to these retailers?

[fol. 381] A. I presume they were. It was my instructions they should be contacted, at any rate.

Q. Who instructed you to do that?

A. I don't believe anybody instructed me to do it.

Q. I understood you to say those were your instructions.

A. To Mr. Cummings or Mr. Powers.

Q. Oh, you instructed them to do it?

A. Yes.

Q. I misunderstood you. And that included Standard, too, didn't it, of Richmond?

A. It included all.

Q. Now, subsequent to August 28th of 1956, isn't it a fact, Mr. Dripps, that for a period of several weeks there was no cut-rate advertising in the Washington newspapers by either Dart, Peoples, Drug Mart, or the Drug Mart group?

A. Well, none were brought to my attention.

Q. You did not know of any, is that right?

A. That's right.

Q. There was one, Standard advertised in September, you knew that?

A. Well, I didn't know about it but it has been brought out here.

Q. But to your knowledge this group that I have just mentioned did not advertise until sometime in November; [fol. 382] isn't that correct?

A. I believe that's right.

Q. Now, on this question of advertising, you felt, didn't you, Mr. Dripps, that if you could keep down the advertising you were doing something to control the resale price market in the District of Columbia.

A. I wasn't interested remotely in controlling the retail price situation in Washington, Mr. Kenney. I was only interested in continuing the good will of our products and the good will we had established with our customers.

Q. Didn't you, more or less, look upon the advertising of the cutrates in the same light you would look upon the selling at cut-rates?

A. Yes.

Q. So, in that sense you felt that if you could control the advertising you would have accomplished something in controlling all of these price cuts; isn't that right?

A. I can only repeat I was not interested in controlling advertising practices of anybody.

Q. Let me ask you, were you interested in controlling their pricing practices?

A. I was interested in having them follow our policy.

Q. Isn't it true that in November of 1956, when someone

advertised and they all started advertising again, you re-
[fol. 383] garded that as trouble along the line of resale price maintenance?

A. I suppose so.

Q. That is true, isn't it?

A. (Affirmative nod.)

Mr. Kenney: Will you mark this Government's Exhibit for identification No. 21?

(Letter dated 11/21/56 was marked for identification as Government Exhibit No. 21.)

By Mr. Kenney:

Q. I will show you what has been marked for identification Government's Exhibit 21 and ask you if it is a copy of a memorandum which you wrote to Mr. Johnson?

A. That is right.

Q. It is dated what, sir?

A. November 21, 1956.

Mr. Kenney: I offer into evidence Government's Exhibit for identification No. 21.

Mr. Gesell: No objection.

The Court: It may be received.

(Letter heretofore marked for identification as Government Exhibit No. 21 was received in evidence.)

By Mr. Kenney:

Q. Now, are you familiar with this memorandum, or would you like a copy of it, since I am going to ask you a
[fol. 384] couple of questions?

A. I would prefer a copy, please.

Q. Now, in reading this memorandum, Mr. Dripps, it is true, is it not, that you regarded the fact that these people had again started advertising as blowing up the minimum retail price situation in Washington?

A. That's right.

Q. Now, I would like to go back for a second, Mr. Dripps. On the question of Peoples and Drug Mart, did you know, in the summer of 1956, let's say August, that the Drug Mart

group had told Parke Davis that they would refrain from advertising in the newspapers at cut prices?

A. Well, I suppose I did. I don't remember the specific incident, but if Mr. Powers had talked with them I am sure he advised me of it.

Q. Perhaps I can help you a little bit.

Mr. Kenney: Please mark this Government's exhibit for identification No. 22, please.

(Memorandum dated 8-17-56 was marked for identification as Government Exhibit No. 22.)

By Mr. Kenney:

Q. I am going to show you Government's Exhibit for identification No. 22 and ask you if this is a memorandum which you received on August 17, 1956? Can you read that?

A. Yes, I think so.

[fol. 385] Q. And is it from a Mr. Lynott?

A. No.

Q. What is the name?

A. Ryall.

Q. Is that R-y-a-l-l?

A. Yes.

Q. Who is he?

A. A salesman here in Washington.

Mr. Kenney: I offer in evidence what has been marked Government's Exhibit No. 22 for identification.

Mr. Gesell: No objection.

The Court: Mark it received.

(The memorandum heretofore marked for identification as Government Exhibit No. 22 was received in evidence.)

By Mr. Kenney:

Q. I will hand you a copy of this, Mr. Dripps. Does this memorandum indicate to you that Peoples and Drug Mart had agreed that they would not advertise at cut rate prices in August of 1956?

A. It indicates to me, Mr. Kenney, that they were not advertising. It does not indicate to me that they had agreed not to.

Q. It doesn't. Doesn't it say that Peoples did advertise but they advertised at the minimum retail price?

A. But they frequently did that, sir.

[fol. 386] Q. They frequently did that. It says it is a vote of confidence. Do you know what that means?

A. I presume the boy meant that they were following our policy.

Q. Following your policy. Now, I notice he says, "Dart is still giving us hell. Had better find out the source of their supply." Did you ascertain, or try to find out where they were getting Parke Davis products?

A. No.

Q. Do you know if Lynott or Lykell, did?

A. Well, you have the wrong name on here, Mr. Kenney.

Q. I am sorry.

A. The name is Ryall, R y a l l. You have Lynott on here.

Q. Now, this has written across it the name of Walker.

A. Yes.

Q. Does that mean you sent it to Detroit to Mr. Walker for his notification?

A. I presume so.

Q. Talking of Mr. Walker, when you visited these people on the 28th of August and the suggestion came from somewhere that perhaps if they stopped advertising you would sell them again, didn't you make the statement you would have to take that up with Mr. Walker in Detroit?

A. Yes.

[fol. 387] A. And did you?

A. Yes.

Q. And Mr. Walker said it would be satisfactory?

A. He did.

Q. Now, getting back again to your wholesale policy, I want to refer to the visit you made to the Washington Wholesale Drug Exchange. Do you recall that, sir?

A. Yes.

Q. Now, isn't it true that in 1955, in October, the Washington Wholesale Drug Exchange was giving its members a so-called deferred discount on Parke Davis items?

Mr. Gesell: If Your Honor please, I renew my objection. This is the testimony on discounts that was stricken from

the witness yesterday because it related to the second count rather than the first.

We are embarking into events in 1955 and I think Your Honor granted my motion yesterday in so far as it related to the cash and anticipating discount testimony of the witness yesterday.

Mr. Kenney: Well, it was more or less my understanding, sir, that on my request you were going to reserve your ruling until I had an opportunity to examine this man, and at the conclusion of this examination I would like an opportunity to be heard as to why this evidence is not only relevant but is admissible.

[fol. 388] The Court: My recollection is that I overruled the objection subject to a motion to strike, and the motion was never made.

Mr. Gesell: I believe at the conclusion of the evidence I made the motion and Your Honor granted it.

Mr. Kenney: But then I said, "Would Your Honor wait until you have read Mr. Dripps' deposition?"

Mr. Gesell: I said, at page 262 of the transcript, "At this time I move to strike," and Your Honor said, "The motion will be granted," and then Mr. Kenney said he would like to be heard, and Mr. Kenney said he had Mr. Dripps' deposition and we got over into a discussion of the admissibility of the deposition.

The Court: I have not read that transcript, yet.

Mr. Gesell: Could I hand it up to you?

The Court: I have sent for my own copy. I did not receive it in time to read it all.

Mr. Gesell: Your Honor did say, "Why don't you call him? You can ask that to impeach him. He is sitting right here." And Mr. Kenney said he would defer calling him.

The Court: Well, that was with respect to introducing that deposition.

Mr. Kenney: If you will read, Your Honor——

The Court: This is not that, is it?

Mr. Gesell: At page 262, if you will read the third para-
[fol. 389] graph from the bottom.

The Court: I have already ruled on that this morning, didn't I?

Mr. Kenney: On the deposition, yes.

The Court: That is what I am talking about.

Mr. Kenney: But I did not understand that you had ruled on the evidence which this man might give on this question.

The Court: Not at all.

Mr. Kenney: That was my understanding.

The Court: I will overrule your objection. You may answer the question.

Mr. Gesell: You did grant the motion to strike, if you will notice on page 262.

The Court: Yes, I did.

Mr. Kenney: Did you say I could ask him, Your Honor?

The Court: Ask it again. I forgot your question.

Mr. Kenney: Very well, Your Honor.

By Mr. Kenney:

Q. Isn't it true, Mr. Dripps, that in October of 1955, the Washington Wholesale Drug Exchange was giving its purchasers a so-called deferred discount on its sales of Parke Davis products?

The Court: Is that within the purview of your knowledge? [fol. 390] The Witness: It is, sir.

The Court: What relevancy has it?

Mr. Kenney: Would you give me a minute on that?

The Court: Yes.

Mr. Kenney: I will have to have a little reading matter before me. Let me say that the Government has charged here in its complaint that beginning in or about July of 1956 and continuing thereafter up to and including the date of the filing of this Complaint, the defendant, the co-conspirators herein named, and others to the plaintiff unknown, knowingly has entered into and engaged in an unlawful combination and conspiracy to establish, maintain, enhance, and fix the wholesale and retail prices on pharmaceutical products manufactured by defendant, Parke, Davis.

As one of the means that is charged in this complaint of doing this, under Section (a), page 4 of the Complaint, we say, "A, that on sales of pharmaceutical products manufactured by defendant, Parke, Davis, the wholesaler co-conspirators and retailer co-conspirators will adhere to resale prices fixed by defendant, Parke, Davis."

Now, we charge price fixing and I intend to show by this evidence that discounts are a part of the price.

The Court: Discounts by whom?

Mr. Kenney: The wholesalers.

The Court: On Parke Davis goods?

[fol. 391] Mr. Kenney: Yes. The evidence shows Parke Davis would not permit the wholesalers to sell at prices less than theirs. I am going to show that this Washington Wholesale Exchange subsequent to this time, when they were asked to and did drop the deferred discounts, put in a two per cent cash discount and that there was—the Parke, Davis Company agreed to this at first but later came around to the view that because they were putting this in their vouchers that they were selling at a lesser price than Parke Davis and had a competitive advantage over Parke Davis.

So, Parke Davis went to them and said, "We want you to stop this" and they agreed to do it. That is a continuing conspiracy. That is still going on today. And, Your Honor, on this question of dates, I hope——

The Court: Didn't you get that in the record yesterday by the last witness?

Mr. Kenney: Yes, but I am afraid it wasn't too clear and I want to interrogate this man on it so the record will be very clear.

The Court: Is this with respect to 1956?

Mr. Kenney: 1955, '56, '57 and '58.

The Court: I will confine you to 1956, 1957 and 1958.

[fol. 392] By Mr. Kenney:

Q. Now, isn't it true, Mr. Dripps, that early in 1956 you approached the Washington Wholesale Drug Exchange and had a conversation with Mr. Bradshaw?

A. I don't remember the date, Mr. Kenney.

Q. It was in 1956, wasn't it?

A. I don't know.

Mr. Kenney: Well, Your Honor, I will make an offer of proof that it was in 1956.

The Witness: I am not saying it wasn't, Mr. Kenney. I am saying I do not know.

By Mr. Kenney:

Q. Isn't it true that in the early part of 1956, when you visited Mr. Bradshaw that the Washington Wholesale Drug

Exchange had an understanding with you that they would be permitted to give a two per cent cash discount?

A. Mr. Bradshaw said that and if he said it—he is an honorable man and I am sure I said it.

Q. During this visit, or prior to the visit, you learned that they were giving this discount for cash in their vouchers?

A. Yes, I presume that is right.

Q. And so, under your interpretation of that, the purchaser got the cash discount whether or not they paid by cash on time, isn't that right?

[fol. 393] A. That's right.

Q. You took the position that this gave the Washington Wholesale Drug Exchange a competitive advantage over Parke Davis?

A. I said that.

Q. You asked him to stop it, did you not?

A. I did.

Q. He said that he would?

A. He did.

Q. And he did, didn't he?

A. To the best of my knowledge he did.

Q. And they still do not give this cash discount, do they?

A. I believe he gives it, but——

The Court: In a different form, as I recollect his testimony.

The Witness: That is right.

By Mr. Kenney:

Q. The effect of his ceasing this cash discount on Parke Davis items means his customers have to pay two per cent more, isn't that true?

A. No, that is not true.

Q. It doesn't mean that? They don't get the two per cent cash discount on Parke Davis products, do they?

A. I don't know how they could avoid it if they pay cash [fol. 394] for them. The policy is to allow two per cent cash discount.

Q. Those who pay and don't pay within the ten-day period have to pay more, is that right?

A. They do from us, too.

Q. They do also from the Washington Wholesale Exchange?

A. Or any other place of business.

Q. Prior to this, though, they did not?

A. I believe he indicated yesterday that he had previously not granted the two per cent cash discount.

Q. But he was granting it at the time you visited him, wasn't he, whether it was cash or not?

A. No, I believe he indicated that he had not ever given it until the time of my first visit.

Q. Isn't it true that you went to see him to get him to knock off this two per cent cash discount?

A. I didn't ask him not to give it. I asked him not to show it on the face of the invoice.

Q. He said he wouldn't in the future?

A. That's right.

Q. Therefore, those who had been previously getting it lost this two per cent cash discount?

A. The ones who were not entitled to it.

Q. Those who were not paying in accordance with your understanding?

[fol. 395] A. Terms, that's right.

Q. And when you sell your goods to Washington Wholesale Drug Exchange they take title to them, don't they?

A. Yes, they do.

Q. You did, again, take the position that if they continued this practice of showing this two per cent discount on the invoice it gave them a competitive advantage over you?

A. Well, it showed an advantage which really didn't exist.

Q. But it gave them a competitive advantage over you?

A. If you would like me to say that, I will be pleased to.

Q. You have said it before, haven't you?

A. I have.

Q. And you will say it again?

A. I suppose so.

Mr. Kenney: That is all.

Cross examination.

By Mr. Gesell:

Q. The whole point is, it wasn't a cash discount, was it?

A. That's right.

Q. And it wasn't in accordance with your catalog?

A. That's right.

Q. You had told him if he didn't live up to the catalog [fol. 396] prices you would not sell to him?

A. That's right.

Q. You had no objection to giving a true cash discount to anybody?

A. That's right.

Q. It is done throughout the trade, isn't it?

A. It is.

Q. Now, on this question, Mr. Dripps, of your relations with these wholesalers, and the extent of the competition between Parke Davis and the wholesalers, what percentage of the District of Columbia market does Parke Davis have in these pharmaceutical products?

A. Are you referring, Mr. Gesell, to our total market, wholesale sales and direct sales?

Q. Yes.

A. I would like to think that we do as much as five per cent.

Q. Somewhere below five per cent?

A. I am afraid it is. I would like it not to be.

Q. Your belief is the same in Richmond?

A. Yes.

Q. Now, these wholesalers call themselves "service wholesalers" do they not?

A. I believe they do.

Q. They render a variety of services that Parke Davis does not render, isn't that a fact?

[fol. 397] A. Yes.

Q. When you talked to your salesmen, you were asked about your discussion with Mr. Cummings and Mr. Powers, did you authorize any of them to go out and make agreements with any of your customers about prices?

A. No, we didn't seek agreements at any time, nor did I ask our men to seek agreements. I told them to state the policy and the consequences.

Q. The policy was that the wholesalers could not sell to price-cutting retailers?

A. That's correct.

Q. Or they would be cut off?

A. That's correct.

Q. The wholesalers had to sell at the price in the schedule or they would be cut off?

A. That's correct.

Q. And you would not sell to any retailer who sold below your suggested minimum prices?

A. That's correct.

Q. And you authorized no one to enter into an agreement?

A. I wouldn't have the power to authorize anyone to make such an agreement.

Q. Did you give them any such authorization?

A. No.

[fol. 398] Q. Did anyone ever tell you they had entered into any agreements with any of your retailers or wholesalers?

A. They did not.

Q. Is that true of Mr. Powers as well as the other men?

A. It is.

Q. And if any of these men entered into any agreement with any retailer or wholesaler they were going outside of their authority from you?

A. Very definitely.

Q. Salesmen do not have the authority to enter into contracts, do they?

A. They do not.

Q. Now, on all of this question of price that we have been talking about, whether or not the retailer maintains the suggested resale price, or the wholesaler maintains the suggested price to the retailer, makes no difference in the amount of money Parke Davis gets, does it?

A. Oh, that is right.

Q. You get the same for the goods whether they sell above or below the suggested minimums?

A. That's correct.

Q. Now, you told Mr. Kenney that you were concerned with the effect on the good will of the Parke Davis products which was caused by the advertising of cut prices?

A. Yes.

[fol. 399] Q. Now, will you tell us what you meant by that?

A. Well, if I may draw an example, if you were in a retail operation and the price of some product you were featuring was being cut so that your profit was really practically non-

existent—In other words, if you were not making a profit on any item, would you continue to feature it?

Q. Now, will you explain what you mean by that?

A. Well, let us take a specific example. One of our popular over-the counter products is Myadec capsules. If the retail pharmacist buys Myadec capsules in units of one he pays $6.45 for that package. The minimum resale price is $9.67 and I believe if you figure the profit it will be equal to about thirty three and a third.

Now, if that product is being sold as low as $6.45 and in many instances it was being offered at prices below that, there certainly is no incentive for you, as an individual buying it for $6.45 to sell it for $6.45 or below, is there?

Mr. Kenney: Your Honor, may I have a continuing objection to this line of questioning?

The Court: You may. Same ruling.

Mr. Kenney: Immaterial and irrelevant.

[fol. 400] By Mr. Gesell:

Q. What is the effect of that, then, on the development and promotion of Parke Davis products by such retailers?

A. Well, the average customer will no longer buy from us those items which he had previously been getting.

Q. Is that the situation to which you referred in response to Mr. Kenney when you said you were interested in the good will and name of your product?

A. Definitely.

Q. Parke Davis not only competes with wholesalers but encounters a great deal of additional competition on the market, doesn't it, Mr. Dripps?

A. Yes, to put it mildly.

Q. And none of these discussions with the wholesalers or the retailers has anything to do with the price of anything but the price of Parke Davis goods, is that not correct?

A. We are not interested in any other company's merchandise.

Q. During this time that some of the retailers were not advertising cut prices, following conversations with you or Mr. Powers or other men, you understood, did you not, that they were all charging cut prices in their stores?

A. I understood that they were free to. I did not know whether they were.

[fol. 401]. Mr. Gesell: No further questions.

Redirect examination.

By Mr. Kenney:

Q. Mr. Dripps, I believe you testified that you learned in Detroit that you had a policy whereby you could fix these retailers who were cutting prices so that you wouldn't sell to them, isn't that right?

A. Yes.

Q. You came from Detroit, where the President of the Company and Vice-President had informed you of this, and you called Mr. Cummings in and said this is what happened, isn't that right?

A. I don't know whether I called him in, but I talked with him.

Q. And you said, "Now, I want you to go to the retailers and I want you to go to the wholesalers," isn't that right?

A. I believe so.

Q. This was immediately after you came back from Detroit?

A. Soon thereafter.

Q. And it was immediately after the President had told you to go ahead and enforce this thing so that when Mr. Cummings approached the wholesalers and retailers he was doing it not only on your instructions, but in line with what [fol. 402] you understood from Detroit, is that not right?

A. That is not right.

Q. Didn't you tell him to approach the wholesalers and retailers?

A. Yes, but I did not do it on Mr. Loind's instructions. If you will read it carefully, you will see I did not.

Q. He told you to approach the retailers, is that right?

A. I told Mr. Loind that I would go back and enforce the policy.

Q. Mr. Loind said to go ahead and do it?

A. I don't remember what he said, but that is possible.

Q. Acting under that general instruction from Mr. Loind you told Mr. Cummings to go to these wholesalers and retailers, is that right?

A. I did.

Q. And Mr. Cummings, following your instructions and within the course of his duties, did just that?

A. That's right.

Q. Now, at the time under discussion here, in the summer and fall of 1956, Parke Davis wasn't the only manufacturer of pharmaceutical products whose products were being advertised at cut prices, were they?

[fol. 403] A. I don't believe so.

Q. In fact, all leading companies like Babbitt's and Walker, they were all being advertised, weren't they?

A. I presume so.

Q. Isn't it true that the volume of Parke Davis sales in this territory has gone up rather than down since the year 1955?

A. Well, I don't have specific figures but I would hope it has.

Q. Wouldn't you say, as a matter of general knowledge, that the volume has gone up?

A. Our sales volume has gone up generally. I presume the same thing applies here.

Q. Now, a couple of other questions, Mr. Dripps. You recall in the fall, probably around November, when agents of the Bureau of Investigation came to you and said they wanted to get some information about your practices?

A. At what time?

Q. I don't know the exact time, but I think probably in November of 1956?

A. Possibly.

Q. Do you recall them submitting a list of questions to you and asking you if you would be good enough to answer those questions?

A. I believe so.

[fol. 404] Q. You took this list and sent it to Detroit, didn't you?

A. I believe I did.

Q. They answered some of the questions for you?

A. I believe so.

Q. And I will show you a set of these questions and also the answers and ask you if you recognize them.

A. May I have a glass of water while I am reading this?

The Court: The Marshal will get it for you.

(Pause.)

By Mr. Kenney:

Q. Do you recall that, sir?

A. Yes.

Q. Are you familiar with it?

A. Yes.

Mr. Kenney: Will you mark this as Government's Exhibit No. 23 for identification?

(List of questions and answers was marked for identification as Government Exhibit No. 23.)

By Mr. Kenney:

Q. Now, Government's Exhibit for identification No. 23 consists of a list of questions submitted to you, does it not, Mr. Dripps, and the answers to some of the questions furnished to you by Mr. Bradshaw?

[fol. 405] Mr. Kenney: I offer what has been marked for identification Government's Exhibit No. 23 into evidence.

Mr. Gesell: I have no objection to it.

The Court: Mark it as received.

(List heretofore marked for identification as Government Exhibit No. 23 was received in evidence.)

By Mr. Kenney:

Q. Now, these questions were directed to you as head of the Baltimore office, were they not?

A. Yes.

Q. But you sent them on to Detroit to get the policy statement from Detroit, is that not right?

A. I sent them to Detroit so I wouldn't make any mistake in answering them.

Q. They suggested some answers to you and told you what the policy was. In response to question one, the date

the minimum retail price policy went into effect, and whether the policy is still maintained by the Company, they told you that it went into effect on January 1, 1954?

A. It says prior to January 1 of 1954.

Q. Yes, prior. It says, in answer to question 2, the policy originated at the home office of the Company, isn't that right?

A. Yes.

Q. And in answer to question No. 3, it says that this [fol. 406] policy applies to the entire geographical area of the Baltimore branch area?

A. It does.

Q. And in answer to question 4, drug retailers are acquainted by the policy——

Mr. Gesell: It is all written out here.

Mr. Kenney: I will get to the point in a minute.

Mr. Gesell: Why don't you?

Mr. Kenney: —in catalogs and as explained by sales representatives, is that right?

The Court: Did you answer yes?

The Witness: I did, sir. It is written here so I cannot deny it.

The Court: But the stenographer cannot record a nod.

The Witness: I am sorry. You have had to remind me of that twice. I am sorry.

By Mr. Kenney:

Q. Now, supposedly, the branch managers, including yourself, were advised of these minimum retail price policies at annual meetings in Detroit, is that right?

A. It says prior to 1954, yes.

Q. Now, it had been in effect long prior to 1954 but you weren't acquainted with it until June of 1956, is that correct?

[fol. 407] A. It doesn't say that it was announced in January of 1954. It says prior to 1954. That might be any time prior to 1954.

Q. You weren't advised orally in any sales meeting until 1956?

A. I don't know that the question ever came up.

Q. Didn't you raise the question as to whether it applied in non-fair trade areas?

A. I did.

Q. And you were told it did?

A. That's right.

Q. So, you didn't know it until then?

A. I don't believe that was your original question.

Q. I will ask you now, Mr. Dripps, isn't it true, although the policy was in effect long before January 1, 1954, you did not know it until June of 1956?

A. I didn't know of its application to a non-fair trade area.

Q. So, consequently, your customers didn't, either.

Now, as to question six, the answer to that given to you is, "No," is it not?

A. Yes.

Q. But is that answer absolutely correct?

A. Well, may I make an explanation?

The Court: Yes, you may.

[fol. 408] The Witness: I presume that when Mr. Bradshaw referred to Parke, Davis and Company that he refers to the home office. Mr. Bradshaw couldn't possibly know what we were doing on a local level, everything we did, and I believe that is the reason he answered the question, "No."

By Mr. Kenney:

Q. I see. Was it your understanding, however, that there was submitted to you only in connection with Maryland, or was it your understanding that it also applied to the national office in Detroit?

A. I didn't make any assumption.

Q. You didn't. Is it true that Parke Davis did submit a list of drug retailers to wholesalers in this area?

A. As they indicated, we did not submit a list. We told them the names of the retailers they should not sell to.

Q. Verbally. Now, the answer to question seven isn't quite correct, either, is it?

A. I believe the same applies to seven as applies to six.

Q. But I understood the testimony. Well, you think it applied nationally rather than to your particular territory?

A. I believe that was Mr. Bradshaw's interpretation. That is supposition on my part.

Q. You think this would reflect the national policy of Parke Davis?

[fol. 409] A. Possibly.

Q. It is true, in this area, drug wholesalers would be advised of this policy under Section 7. Well, that is all I have.

Recross-examination.

By Mr. Gesell:

Q. Before you went to work as head of the Baltimore branch office you had been branch manager in a fair trade State, had you not?

A. Yes, I had had no experience with non-fair trade areas before coming to the Baltimore branch.

Mr. Gesell: That is all.

Further redirect examination.

By Mr. Kenney:

Q. When did you come to Baltimore?

A. In 1954.

Mr. Kenney: That is all.

The Court: You may step down.

(Witness was excused.)

Mr. Kenney: Your Honor, the Government rests.

Defendant's Motion to Dismiss Complaint

Mr. Gesell: If Your Honor please, at this time the defendant moves, under Rule 41 (b), for a dismissal of the complaint. If Your Honor would like, I can state our grounds and argue it now or how would you like to proceed?

The Court: Well, can you finish your argument by four [fols. 410-411] o'clock with a fifteen-minute recess? Possibly it would be better for you to wait and collect your thoughts and let Mr. Kenney collect his, also, and we will have the battle on Tuesday.

Mr. Kenney: I would appreciate that, Your Honor, because I would like a little time to read this record.

The Court: Yes, and I would like to, also. You see, I have gotten about a third of the way through yesterday's record and I would like to read today's record. So, I will be thoroughly versed with the facts on Tuesday and you can instruct me, of course, on the law.

[fol. 412] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

Transcript of Proceedings of June 17, 1958

The trial was resumed at 10:25 a.m. today, before Judge Joseph R. Jackson.

APPEARANCES:

For the United States: Mr. Edward R. Kenney, Mr. Marshall C. Gardner, Mr. Herbert F. Peters.

For the defendant: Mr. Gerhard A. Gesell, Mr. David B. Isbell.

[fol. 413] PROCEEDINGS

The Court: Gentlemen, it is too bad that I have trespassed on your time to the extent of some 25 minutes, but I assure you it was a matter of necessity caused by meeting several men of your profession who needed to talk with me.

Mr. Kenney: Sir, the Government has wasted so much of your time in this case ——

The Court: Oh no. As I have told you, your time is mine.

You may proceed with your argument, Mr. Gesell.

Mr. Gesell: Thank you, Your Honor.

ARGUMENT ON DEFENDANT'S MOTION FOR DISMISSAL

Mr. Gesell: If Your Honor please, what I would like to do this morning, in arguing our motion under Rule 41 (b) to the effect that the Government hasn't on the facts or the law shown any right to relief, would be to go down into the

evidence a bit with Your Honor, in some detail, to point out our main contention.

Basically we have three points in support of the motion. First of all we say that the evidence shows that Parke Davis did nothing more than exercise unilaterally its independent right as a trader to select its customers.

[fol. 414] The Court: The Colgate case?

Mr. Gesell: Under the Colgate doctrine.

Secondly we say that if there was any kind of an agreement with some of these retailers concerning cutprice advertising—we say there was not, certainly no conspiracy—the Government has failed to carry its burden in showing that that was in any way unreasonable.

And, third, we say that even if Your Honor on both of those points should conclude contrary to our position, that this case, as I said to Your Honor when we started, was a squabble that took place for a couple of months back in 1956 with a handful of customers. And there is certainly, after all this time, on the face of this record, nothing to justify the intervention of a court of equity, and no threat of any violation in the future.

Of course, Your Honor, the Government has a much heavier burden than it did when we were before Judge Tamm on this same issue. There the question was whether a reasonable man could conclude that there was sufficient evidence so that the matter could go to the jury—the old prima facie doctrine problem.

Here under the rules, with Your Honor sitting as the trier of the facts, the standard is something different. I don't have to tell Your Honor that. You helped set the standard [fol. 415] in this circuit in the Gypsum case, which has stood as the law and has not been changed in that particular since the three judges concurred in that decision.

The Court: Incidentally, I might tell you, that was a terrific headache for the three judges.

Mr. Gesell: Well I am awfully glad it has been determined in that case and we have it before us, because the preponderance of the evidence rule is what we have to go with here, and Your Honor will have to say whether he would, if we didn't go forward with any case at this time, conclude on all of the evidence that all or some aspect of the complaint has been sustained. And if you would say you would

not as a trier of fact so conclude, as I understand the rule, we are entitled to our motion.

Now the central issue here, of course, is the question of whether or not there was a conspiracy to fix retail prices. We start off, it seems to me, with certain background that Your Honor should have in mind. The evidence shows that the lawyers of the company gave an opinion which correctly stated the view of the law. The evidence shows that the instructions from the President of the company, Mr. Loyne, to Mr. Dripps were in terms of the Colgate doctrine—not in [fol. 416] terms of agreement but in terms of refusal to sell.

In addition to that, Mr. Dripps has testified that he gave no contrary instructions of any kind to anyone, but that he proceeded in accordance with the instructions from the President of the company.

I think all of us who know how corporations act would find that testimony believable, because the President intervened in this case and gave his instructions clearly.

Now we are concerned here also with a case that involves on the record no policing, no espionage system, no card files, no elaborate paraphernalia for policing prices in this jurisdiction. Indeed, Your Honor, out of the 260 retailers in this jurisdiction of the District of Columbia, we have evidence just as to five of them. And there isn't a jot of evidence that any other of the 255 retailers cooperated with Parke Davis in connection with trying to bring these people into line, or anything of the kind. It is totally different than the usual kind of case which comes up where this Colgate doctrine is in issue. We have five retailers—one of a hundred in Richmond, five out of 260 in the District of Columbia.

What I would like to do is take up the testimony of some of the key retailers and show you where it seems to me the [fol. 417] evidence comes out. Now let us take Mr. Haft. I am going to have a little more to say about him a little later. But at this time, what is the best evidence? Recognizing that he was a man with what we might call at least a flexible kind of recollection, and a man who perhaps let his wishes become the father of his thoughts, what would be the best evidence?

Well, we have a memorandum that he dictated in the presence of the Parke Davis men when this whole thing started. And he had his secretary sign it. He wrote it out

in his own hand, and it was on that day. And the first paragraph is straight Colgate—nothing about agreement anywhere in the document——

> "That any direct account of Parke Davis, whether it be in Maryland, Virginia or the District, which does not abide by minimum retail prices as listed in their catalog, will be cut off from direct buying.
>
> "Furthermore, any wholesaler who sells a retail store below minimum resale prices, as listed in our catalog, will be cut off from direct buying."

That is a straight statement of the instructions that Mr. Dripps said he got from Mr. Coyne and gave to his men to [fol. 418] give, and nothing else. And that was written before all of the atmosphere of this case overwhelmed that witness, and it was perfectly clear that that is what these men said to him. And if you need more, we can go to his testimony at page 70, where I got a chance at him at cross-examination and asked him this question:

> "He simply said that if you did advertise he wouldn't sell to you, and if you didn't he would?
>
> "That is right, sir."

Now let us take Rodman, of McReynolds' Pharmacy. He testified on this subject on page 99 and 100. And again I submit that this is Colgate language. He talked about his visit from Mr. Cummings, and he said:

> "So we went into the office, which is right outside our store, and Mr. Cummings informed me that it was the policy of the main bosses that there will be no price cutting on Parke Davis merchandise, and if we continue to cut prices they will no longer sell us."

Explicit from that witness, and he developed it over the rest of that page of the transcript and the next.

[fol. 419] Now if we turn to Rosenthal, of Standard, who is the next witness, we have two witnesses from that company—the father and the son. At page 192 what does the son say?

> "That they wanted us to discontinue price-cutting on Parke Davis products, and they felt it so strongly that

if we did not discontinue cutting on Parke Davis products, they would discontinue selling us."

Straight Colgate. His father, Mr. Sam Rosenthal, says, at 202 of the transcript:

"My buyers informed me that they had been told by the Parke Davis representatives in our territory that they — the sum and substance was — that they would discontinue selling us unless we raised the prices on Parke Davis products to their suggested retail price."

I can't see how, on the face of that evidence and the evidence like it, any conclusion is permissible but that we were simply exercising our right to select customers. Mr. Rodman refused, when we talked to him, and we refused to sell him. That is all there was to it.

[fol. 420] Mr. Davis, at 186, speaking for Drug Mart, has the same testimony. There is no testimony from Babbitt. There is no testimony from Peoples.

So if you take this group of retailers, right down the line, every one of them testifies to a conversation with the Parke Davis people which is explicitly in Colgate terms.

When we come to the wholesalers, I don't see any difference in the testimony. Mr. Allen of Gilpin, for example, testified that they followed Parke Davis policies for 18 years, and they had no agreement. Well, you can't make a conspiracy out of that.

Mr. Duncan said Parke Davis wouldn't sell to anyone who cut, and he understood that that was the basis upon which he was acting. So it is clear as to Gilpin.

As to Washington Wholesale there was no agreement. The witness testified they just followed the minimum retail policy.

District, Mr. Estrin testified to the custom of the trade, and he assumed he would be cut off if he didn't go along, and he testified there would be no agreement.

Then you remember Mr. Russell, at page 218 of the transcript. I went right down the line with him:

"At the time that the Parke Davis representative [fol. 421] spoke to you about selling to non-drug outlets they did not ask you to make any agreement, did they?

"No, sir.

"They simply told you that if you sold to non-drug outlets, you would be cut off?

"Yes, sir.

"At the time they talked to you about selling to Standard, you knew Standard was a price cutter?

"I knew that, but nothing was mentioned about their cutting of prices in the telephone conversation.

"They did not ask you to make any agreement?

"No, sir.

"And you did not make any agreement about Standard?

"No, sir.

"You understood that if you sold Standard you would be cut off?

"That is right."

So I say to Your Honor that the evidence taken as a whole, whether you view it from the point of view of the retailer or the wholesaler, is Colgate language.

[fol. 422] Now we have a different situation, to degree, I think, with respect to advertising, because at the time of the discussions concerning advertising most of these people had been cut off, and we were confronted with the situation of what was in effect a reinstatement. And, as many of the courts have pointed out, implicit in a reinstatement is apt to be language which is suggestive of agreement.

But the fact still remains that there is no evidence we solicited any agreement, and there is no evidence we acted any differently as to advertising, in that aspect of our sales policy, than we did generally. And we have got quite an unusual thing here, Your Honor, on this advertising aspect of the conspiracy. The interrogatories named five concerns that were supposed to have conspired about advertising.

They are Babbitt, and there isn't a word in the transcript about his advertising. He never appeared. And that is out.

There are Peoples. And the only evidence as to Peoples is that Peoples put in some ads that didn't cut prices. We don't even know that they were all their ads. There is no evidence of any conversation with Peoples by anybody except Mr. Powers, who testified at 320 of the transcript to a

[fol. 423] straight Colgate type of conversation with Mr. Downey.

There is Standard, and Standard says it didn't make any agreement about advertising. The witnesses are explicit on that as to Standard, and are proud of the fact that they didn't go along with Parke Davis' policy.

So there are only two left—Drug Mart and Dart Drug. Now Drug Mart, it is perfectly clear from the testimony, at page 185 and 186 of the transcript, made no agreement. It is clear, also, that whatever Drug Mart did about its joint advertising, it didn't affect the advertising of the member stores, either in their windows or otherwise. And there is no testimony there of a conspiratorial character.

And so when we get all through we come down to Mr. Haft. Now as far as Haft is concerned, he talked about two advertising agreements—the first one made with Mr. Powers and the second Mr. Powers and Mr. Dripps.

The first one, I have already read you the testimony, at page 70, in which he said we simply said that we wouldn't sell to him if he did advertise. And he said that was right.

So I think the first so-called advertising agreement goes down the Colgate drain with the rest of the proof.

[fol. 424] Now as to the second, there is a conflict of testimony. He says we asked him to make an agreement and he did make an agreement, and that the agreement was for the purpose of trying to put an end to the antitrust investigation. And it is all quite elaborately developed in his testimony. Our witnesses, the other two people who attended the conversation, deny it. So there is a conflict in the testimony concerning it.

Mr. Haft, I think, is an unreliable witness, and I think he is not entitled to be believed. He is not only the complaining witness in this case, he is not only a witness who will benefit if Parke Davis were to lose this action, because he has been talking to his lawyer about a treble damage suit against us; but, in addition to that, his testimony, as we were able to probe it, both showed inconsistencies and is in conflict with the testimony of other people.

He brought in with considerable emphasis and satisfaction a statement that Mr. Estrin, presumably acting for us, was the implication, used the word "blacklist." Mr. Estrin

denies that he used such a word, and he says Mr. Haft is not telling the truth with respect to that.

Then you will remember how often he tried to work the word "agree" into his testimony. And I caught him at it; [fol. 425] because in the last trial he said Mr. Walker never mentioned agreement, and when he tried to entrap Mr. Walker into using the word "agreement" Mr. Walke didn't use it. But on this trial he said Mr. Walker said, "Aren't you ready to agree?"—"Aren't you ready to agree?" Well, that is unbelievable testimony and he had to retract it himself.

And I think you also probably, Your Honor, without burdening the point, noticed what I might call his flexibility or his ability to improvise when he discussed so readily that advertisement of Standard dated September 30 and explained in detail the circumstances under which it had been published. And it all turned out that none of it was true and he just grabbed on the first convenient idea that came into his head that might explain another inconsisteney in his testimony.

Now on top of that here is a man who acknowledged from that stand a business practice that I submit is unethical, but at least if it isn't unethical is a business practice which we had every right to try to stop. And that is of getting your own private brands all put nicely on your shelf, and enticing members of the public in with cutprice ads, and paying your salesmen so they will switch them to your own brand. If anything demoralizes the trade, if anything is, [fol. 426] in Judge Tamm's language, reckless pricecutting, that is it. And we certainly were acting reasonably and properly to try to put an end to that kind of conduct.

So I think that the advertising aspect of the case is no different than the rest of the case on the Colgate doctrine.

Now on top of that, Your Honor, what have we got? It is acknowledged that with the exception of Haft, with whom we don't choose to do business, all of these retailers are cutting prices, all of them are advertising, all of them are buying from Parke Davis, all of them are buying from the wholesalers. This is admittedly a highly competitive business, as it has been from the beginning, with us having, I think the evidence showed, less than five percent of the busi-

ness, being one out of two thousand suppliers, selling 600 out of some 167,000 products.

The Court: May I interrupt you for just a minute? Is the Dart company still purchasing your product through wholesalers?

Mr. Gesell: Yes, and the evidence so shows.

The Court: All right. I wanted to be clear on that. I thought it was.

Mr. Gesell: Yes. The evidence so shows. They are not [fol. 427] purchasing from us.

The Court: Directly.

Mr. Gesell: Directly.

Now this pricecutting and advertising concerned—well, we don't know in many cases how many products, but as far as Mr. Haft was able to identify them—12 vitamin products that he used, one witness said, as scenery. I would say loss-leaders. And that out of this whole business of 167,000 products in a market with 2,000 competing suppliers. I don't see anything here that would justify Your Honor's saying that you are confronted with a threat or a problem or a public injury or a need to intervene. I would say that the most appropriate language here is the same language that Judge Tamm used—"There has been a complete lack of proof and the motion should be granted."

The Court: Have you argued the question of the mootness here?

Mr. Gesell: Yes, as far as I feel it necessary, Your Honor. I think it is clear it is all dead and gone. But I must say I find that an unattractive point, because we never come to it. You have to have something to moot.

The Court: Tell me this. Have you seen Mr. Kenney's brief?

[fol. 428] Mr. Gesell: Yes, I saw it this morning.

The Court: All right. I may ask you to do a little replying.

Mr. Gesell: Very well.

GOVERNMENT'S ARGUMENT ON MOTION TO DISMISS COMPLAINT

Mr. Kenney: May it please Your Honor, I would like first to take up a couple of points that Mr. Gesell made, and then I would like to go into my own argument. Your Honor, normally I would consider a motion by defense counsel at

the close of the Government's case a more or less pro forma thing, that defense counsel would usually expect the court to reject. But in view of my experience on the criminal side of this Court, I cannot afford to do that, and I may wish to argue at some length.

I would like to point out that Mr. Gesell is a master of oversimplification. He takes the record and reads a few things from it, and that is the whole story. For instance, one thing he said, we only have five retailers concerned in this situation. That, sir, is absolutely not right. The testimony has been that 30 Drug Mart stores agreed through their coordinator not to advertise.

The testimony has been that Peoples Drug Stores, which number approximately a hundred in this area, agreed with Mr. Powers or said that they would cooperate to abide by [fol. 429] the Parke Davis price policy.

That is not five stores, Your Honor.

The Court: As I remember the record, some Peoples did not do as other Peoples stores did.

Mr. Kenney: I think the record is not too clear. But the testimony——

The Court: I can recall that.

Mr. Kenney: Yes, sir. There was something about the fact that the Peoples Drug Stores in the vicinity of Haft were cutting the prices.

The Court: There was one across the street from his place of business.

Mr. Kenney: Yes, sir. And the others weren't. But it is not too clear in the record.

But the fact remains, sir, that when Mr. Powers visited Mr. Downey, he was soliciting the cooperation of Mr. Downey to see that all Peoples Drug Stores maintained the Parke Davis prices. He asked for that cooperation. He didn't go in and say simply——

The Court: Can you show that in the record?

Mr. Kenney: Yes, sir. I will refer you to page 356 of the record and I will read it to you at this time. I questioned Mr. Powers and I said:

> "When you went to call on Mr. Downey, you solicited his support of Parke Davis policies; is that not right? [fol. 430] "That is right.

"And he said, 'I will abide by your policy'?
"That is right."

Now that wasn't a mere statement that "We are not going to sell to you if you cut our prices." That was a solicitation of cooperation clearly outside the Colgate doctrine.

I have been somewhat surprised that Mr. Gesell, seemingly at least, is making an attempt to claim that Parke Davis could not be bound in this instance by the acts of its agents. I cannot take that too seriously, Your Honor, because the law is so clear on the point that even a salesman's report can bind a company and make it liable for a violation of law, even though that salesman has been instructed not to do something and turns around and does it. I can't take that too seriously.

Now what we have here, sir, and I would like to point out that in our trial brief the Government said to Your Honor we expect to prove certain facts here, and we have proved every one of those facts. What we have is not the unilateral action — and I intend to get into that later, in more detail. How can it be unilateral? Unilateral means action by one. Now how can it be unilateral when Parke Davis goes to a [fol. 431] competitor, a wholesaler, and says, "We want your cooperation. We don't want you to sell to this list of retailers." How can that be unilateral, sir?

Now he talks about Mr. Haft. But I think as Your Honor reads this record you will notice Haft's testimony is pretty well backed up.

The Court: I have a clear recollection of his testimony.

Mr. Kenney: His testimony is pretty well backed up, sir, by the testimony of other people.

Now there is another thing here about this unilateral point that I would like to mention at this time, and that is when Parke Davis cut Mr. Haft off last December I filed an affidavit. The defendant in turn filed a statement in the record of this case, in which they were careful to point out that it is true they were not going to sell to Haft, but they were not going to have their wholesalers refuse to sell to him.

That is a tacit admission, Your Honor, of the fact that

when they cooperate with their wholesalers they are way outside of Colgate.

Now I am not going to get into too much of this evidence, because I think Your Honor has read this record and remembers it well.

The Court: I have. I have read every word of the record. [fol. 432] Mr. Kenney: Well there is one thing, sir, that I would like to point out, and that is that when Parke Davis came to these wholesalers, and Parke Davis makes the claim that they are acting unilaterally in saying to these wholesalers, "We don't want you to sell to these pricecutting retailers," the wholesalers had never heard that they couldn't sell to pricecutters.

Colgate says that in the absence of a monopoly a manufacturer can take unilateral action to cut off a purchaser. It says he can also announce in advance the circumstances under which he will deal. Why, sir, when they came to these retailers and these wholesalers to try to buttress this price-fixing situation, the practices had been going on for quite some time. So there was no announcement in advance.

And I will also call the Court's attention to the record, that one of the wholesaler representatives testified that he entered into a verbal agreement with the Parke Davis representafives that he would not sell to these retailers. And that is Mr. Levin.

Now, Your Honor, I would like first in my own argument to go into this question of mootness. I was sorry that we were as late getting to Your Honor our memorandum. But we found that we had to do a little work. And I hope that [fol. 433] you have had an opportunity of reading it.

The Court: I have.

Mr. Kenney: Now if you have read it, sir, as you say you have, I think you will observe that the Government has set this memorandum up in a way which shows the two types of situations normally involved where an antitrust case is concerned as to whether it is or is not moot.

Before I get into that, I would like to stress to Your Honor the importance of this case. Mr. Gesell says, "We have nothing here. We have only got five retailers and a handful of wholesalers." This case, sir, is of nationa interest. I will say to Your Honor that the criminal case

caused national excitement. There has been a great deal of comment on it.

The effect of this case, should the Government lose, is to say to the States which do not have fair-trade laws—and those are three States and the District of Columbia—and to say to the States where fair-trade laws have been declared unconstitutional—and my recollection on that is that the latest figure is 16—"You don't need fair-trade laws. A manufacturer can operate the same with you as he does in a fair-trade territory. He can agree with you that you'll [fol. 434] charge these prices. He can agree with his wholesalers that they will do this and they will do that." That would be the effect of it.

Now I will say this, sir, that the Government, at least, regards this as a very important case, and that is why we are here.

On this de minimus charge of course I think Your Honor will realize that the amount of commerce is not important in a case like this. It is the type of restraint involved which determines, not the amount of commerce. And in that connection I would refer Your Honor to the famous case which involved one hogshead of tobacco, and the court still said that was interstate commerce. And so is this. There is no question about the interstate commerce here, and there is no question about the commerce within the District of Columbia.

On this question of mootness, too, Your Honor, I feel that the Government is entitled to a decision in this case—win, lose or draw. And before I get into the argument on the practices which the defendant has stopped, I would like to point out to Your Honor that their memorandum completely ignores the testimony about the wholesaler situation which is continuing to the present time.

But I say, sir, that even as to the attempt to fix the resale [fol. 435] prices, and even as to the advertising situation, the question is not moot.

Your Honor will recall that I put Mr. Bradshaw on the stand. My sole purpose in putting him on the stand was to attempt to obtain an admission from him that at least one of the reasons why Parke Davis had abandoned this policy was because of the antitrust involvement.

To me, Your Honor, and I hope to you, that completely answers any question of mootness, because the law is clear on the subject. And I would refer Your Honor to the W. T. Grant case, and to United States versus Trans-Missouri, and particularly to the Aluminum case. And you will recall, sir, that in the Aluminum case the practices of the Aluminum Company had ceased 12 years before. But the court said, "That doesn't mean a thing. That does not take them away from any"—I am trying to remember the words, sir; but from—"any taint of an injunction if they have actually done this thing. Then the Government is entitled to an injunction."

And I would point out, too, sir, that if we don't get an injunction in this case against the question of attempting to enforce resale price maintenance and advertising, this defendant could go out tomorrow and start all over again. [fol. 436] So there is nothing moot about it.

Now the line of cases mentioned in Mr. Geseli's brief I think is quite fully explained in our brief. And it is true that when a termination is compelled by the force of events beyond the control of the parties, and by that same power any continued relationship has become unlawful or impossible, then the case is rendered moot.

But that isn't the situation here, sir. Here we have a W. T. Grant, Aluminum Company, and particularly a Trans-Missouri type situation.

Our memorandum also points out the difference in private suits and Government cases, and I would like to read to Your Honor, if I might, from page 9 of our brief on that question. This is citing the language in the Trans-Missouri case:

> "Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguish- [fol. 437] ment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited.

> The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by the Government. That question the Government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided."

So I say, Your Honor, the Government is entitled to a decision in this case. Win, lose or draw, we are entitled to a decision.

Now, Your Honor, I would like to discuss briefly, if I may, the criminal case. I don't know why Judge Tamm threw the Government out of court. Of course by so doing on the criminal side, the Government had no right of appeal. I [fol. 438] would point out to you, sir, that there is nothing too unusual in the antitrust field about the Government being thrown out on the criminal side of the court, and being thrown out on the same circumstances on the civil side of the court, and then having the Supreme Court review the record and say a mistake has been made. That happened right here in the Real Estate case.

I don't know why Judge Tamm threw us out. I do know this. It was a bad decision. And I say that with all respect. Judge Tamm in deciding that case said this:

> "I had a little trouble for a while reconciling the Colgate case with the Bausch & Lomb case."

And if Your Honor has read the Bausch & Lomb case you could see where he would have a little trouble. But as we pointed out, the basic law on resale price maintenance is stated in four cases, starting with Dr. Miles, going through Colgate, Schrader and Beech-Nut. Now nowhere in his opinion did Judge Tamm mention Dr. Miles, Schrader or Beech-Nut. And this point was noted in a law review article at the University of Michigan.

I would point out to you, Your Honor, that this is a far different case than Judge Tamm heard. Judge Tamm did

[fol. 439] not have the benefit of the testimony of Mr. Powers, of Mr. Dripps, of Mr. Bradbury, or of Mr. Davis. The Government went far beyond its proof in the criminal case on this side of the Court.

Now I think the record is clear. I am not going to discuss it at length, because Mr. Gesell went into his version of it. Your Honor knows what the record says. But I do want to talk a little bit about this Colgate case.

Now the Dr. Miles case, which was the cornerstone opinion and started actually the law on resale price maintenance, had this to say—and I am reading from page 8 of the Government's trial brief:

> "Agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.".

And then it goes on to say that in this particular case

> "The complainant's plan falls within the principle which condemns contracts of this class."

[fol. 440] Now this was a written contract situation, Your Honor.

> "It in effect creates a combination for the prohibited purposes."

But here is the important part of that case from the Government's standpoint, and a point which Judge Tamm ignored completely—and I am reading from page 409 of the decision:

> "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may derive from competition in the subsequent traffic."

Now under the Dr. Miles decision, Your Honor, and that is true today in a non-fair-trade area, the manufacturer can do nothing but cut off a recalcitrant retailer who isn't observing his prices. That is all he can do. We admit that,

Your Honor. We know what Colgate says and we know what you can do under Colgate. You can, acting by yourself, do almost anything to get rid of a customer. But, under the Dr. Miles case, you can't go beyond that.

After Dr. Miles, the Colgate decision was rendered by the Supreme Court. And this decision, as it turned out, was misapprehended by the lower courts. Shortly after the Colgate opinion came down, the Schrader case came along. [fol. 441] And the lower court in Schrader figured this was a Colgate situation "and I am ruling against the plaintiff." The Supreme Court got a hold of the case—and I am reading now, sir, from page 11 of the Government's trial brief and it said, in reversing the case and reiterating its position in Colgate, "We have not eliminated Dr. Miles in any way, and Dr. Miles was not overruled by the Colgate." And I quote to you from page 11, where it says:

> "The court below misapprehended the meaning and effect of the opinion in that cause. We had no intention to overrule or modify the doctrine of Dr. Miles Medical Co. v. Park & Sons Co., where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices . . ."

You will notice the use of express or implied agreements in that statement, Your Honor. And I will talk later a little more about that when I refer to the type of thing that [fol. 442] happened in this case.

Still, even after the Schrader decision, there was some hesitancy on the part of the lower courts and there was some difficulty on the part of the lower courts in reconciling this decision with Colgate. They still thought that Colgate should prevail in any situation involving resale price maintenance.

Then we came to the Beech-Nut case, and for the first time the Supreme Court was considering a case which did not involve written contracts on resale price maintenance.

And in the Beech-Nut case, among other things, the company had advised jobbers, wholesalers and retailers of the prices at which they were required to sell Beech-Nut products to their successive customers. And they had threatened to and refused to sell to all jobbers, wholesalers and retailers who failed to maintain the prices fixed by Beech-Nut, or the prices at which they sold to other jobbers, wholesalers and retailers, who did not maintain the resale price.

Now the Supreme Court considered this case after the lower court had ruled against the plaintiff. And the Supreme Court in deciding the Beech-Nut case harmonized its opinions in Dr. Miles, Colgate and Schrader, and summarized the conclusions to be drawn from these three cases by saying:

> [fol. 443] "By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty for violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combination, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate commerce."

Now, Your Honor, that is where the defendants fail in this case. Under the Colgate case, and under the decisions referring to Colgate, and I just read you from Beech-Nut the defendant could do this. It could go to these retailers and it could say, "You are not observing our prices. We are not going to sell you." It could not even go to the retailers and say, "You are not observing our prices. Will you observe them." It couldn't seek agreement. But it certainly could not, under any set of circumstances, go to the wholesalers and say, "We want you to cooperate with us and not sell to these price-cutting retailers." That is not unilateral. It is clearly illegal, under any decision.

[fol. 444] Now, Your Honor, I was going to discuss the Bausch & Lomb case; but it is so clear in our brief, I don't think I will. But I would like to discuss a little bit about this price fixing.

We have developed a situation here where Parke Davis acts as a manufacturer and a distributor, or a wholesaler. It sells to the same accounts, the same retail accounts, that its wholesaler does. And it says to its wholesaler, "You have got to observe our prices and you can't sell below us."

That is price fixing, Your Honor. It is tampering with the price structure.

Now when they go farther, as they did in the case of the Washington Wholesale Drug Exchange, and say "You can't even give a discount, because it would be a competitive advantage over us," that is more price fixing. And price fixing is per se illegal. Boycotting is per se illegal.

We have two elements of this case which in and of themselves constitute illegality. We have a boycott of retailers by the wholesalers and Parke Davis, and we have price fixing by Parke Davis and the wholesalers.

Your Honor, the Socony Vacuum case says any tamper-[fol. 445] ing with the price structure, any tampering with it, whether to raise, lower, stabilize, peg and so on, is a violation of the law in and of itself.

I think there is a case mentioned in our brief that is somewhat akin to this that I would like to just make a little statement on or at least read the citation, and that is Kiefer-Stewart Company versus Joseph E. Seagram & Sons, at 340 U. S. 211, decided in 1951. And in this case the Supreme Court held that two corporations, a liquor distiller and a distributor, who had combined and conspired to sell whiskey only to wholesalers who would resell at fixed resale prices, had engaged in an illegal concerted refusal to deal, saying:

> "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."

Now, Your Honor, I say that there was an agreement here between the wholesalers and Parke Davis not to sell to these retailers. Mr. Gesell seems to think that we have to get that very word "agreement" in there. Well, we did, actually. But this agreement can be express or implied by a course

[fol. 446] of conduct. And what other conclusion can you draw when Parke Davis went to these wholesalers and said, "We would like you to cooperate," and they do cooperate? That is an implied agreement, clearly illegal.

There is another facet to this case, the advertising one, Your Honor, and it is very interesting. It is very interesting particularly in view of the testimony of Mr. Dripps and Mr. Powers. Your Honor may recall when I had them on the stand I said, "Now, by controlling this price advertising, you thought that you could help control the price market in this area, didn't you?" And they both said, "Yes."

So the advertising is tied in with the conspiracy to maintain prices. They thought it was flagrant when it got to the public that the public could buy these goods at low prices. That is why they hated the advertising and that is why they tried to kill it.

Now one other thing that I would like to point out, Your Honor, before I close here is that in Sherman Act cases where you have section 1 and 3 concerned, the conspiracy is the gist of the offense. In other words, the Government has proved its case if it shows the conspiracy. It doesn't have to show any particular action taken under it. It only [fol. 447] has to show that there was a conspiracy.

We have gone far beyond that here. But I mention that as a point, because it shows how far the Sherman Act goes in condemning conspiracy. And I would refer Your Honor to the case of Nash versus United States, at 229 U. S. 373; the United States versus Trenton Potteries, at 273 U. S. 392; and the United States versus Socony-Vacuum, at 310 U. S. 150.

Now may I have a second, sir? I would like to see if I have overlooked anything.

The Court: You may.

Mr. Kenney: I believe that is all I have.

The Court: Do you desire to make any reply, Mr. Gesell?

Mr. Gesell: Just to call Your Honor's attention to the fact that the Colgate case involved wholesalers, it involved prices, and it involved competition between Colgate and its wholesalers.

Oral Ruling Granting Motion to Dismiss Complaint

The Court: Gentlemen, I have read the daily transcript as it has come in. I have also listened to the witnesses on the stand, and read the transcript to ratify or confirm my impression of their testimony. I have listened to your arguments, and I have carefully read your briefs, and I am prepared to make a decision now, which is as follows:

[fol. 448] That after due consideration of the record herein, together with the briefs and arguments of counsel, the Court is of the opinion that plaintiff has failed to prove the existence of the conspiracy as alleged in the Complaint.

Furthermore, it appears that the acts of the defendant upon which the suit is based had in some measure ceased prior to the filing of the Complaint and since then have stopped entirely. Upon the record, it is the opinion of the Court that there is no reasonable probability of repetition. Therefore, the injunctive relief sought in the Complaint would be merely academic or moot. Counsel, I am sure, are aware of the array of judicial pronouncements in that respect. In addition, defendant's present refusal to sell directly to Dart Drug Stores (although Dart can and does purchase defendant's products from wholesalers) does not constitute a violation of the Sherman Anti-Trust Act, such a course of action being within defendant's rights under the Colgate doctrine.

In accordance with the foregoing, judgment will be rendered for the defendant pursuant to its prayer and against the plaintiff. Counsel for defendant will prepare and present to the Court proper Findings of Fact, Conclusions of Law and suitable Order. Should counsel for plaintiff desire to present to the Court written objections to the Findings, [fol. 449] Conclusions and Order within five days after the receipt of the same, he is free to do so.

(Accordingly at 11:15 a.m. the trial was concluded.)

Reporter's Certificate (Omitted in Printing)

[Fol. 450] GOVERNMENT'S EXHIBIT No. 1

MINIMUM RETAIL PRICES

Applying to

PARKE-DAVIS PRODUCTS

The minimum Retail Prices herein set forth or in Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those states which have not enacted Fair Trade Laws.

Minimum Retail Prices applying to Consumers shall be 10% less than the published List Prices applying on unit stock packages in this Catalog and Supplements applicable unless otherwise specified. Such prices are exclusive of sales and other excise taxes, which are to be added thereto.

FRACTIONAL RETAIL PRICES

In calculating Minimum Retail Prices, the following rule applies where fractions of one cent are involved: if the fraction is more than one-half cent, take the full cent (thus $2.536 becomes $2.54); if one-half cent or less, drop the fraction (thus $2.695 becomes $2.69).

RATABLE ADJUSTMENT

Minimum Retail Prices likewise apply ratably to sales of broken packages:

1) When quantity is less than smallest listed package, the Minimum Retail Price shall not be less than a ratable adjustment of the Price on smallest listed package.

2) When quantity is more than smallest listed package, but less than next larger package, the Minimum Retail Price shall not be less than a ratable adjustment of the Price on next smallest package.

[fol. 451]

PRICES

All prices and quotations are submitted without offer and are subject to change without notice. Orders received by our branches and salesmen, whether based upon submitted quotations or not, are subject to acceptance by the Home Office at Detroit, Mich., which acceptance shall be only by letter or performance. We cannot entertain claims for allowance in the event of a subsequent reduction, any more than we could make claim for increased value in case of a market advance after sale had been made.

The company shall not be liable for any failu perform any contract due to strikes, fires, unavoidable accidents, inability to obtain supplies, contingencies of manufacturing or other causes beyond its control.

SHIPMENTS

All shipments (mail, express or freight) becom the property of the customer when delivered to the carrier.

DAMAGE IN TRANSIT

If goods arrive in broken or damaged condition, insist upon the transportation company's agent noting the damage or breakage upon your expense bill. We cannot hold ourselves responsible for losses which may occur in the transportation of merchandise, whether from shortage, leakage or breakage, except in cases where the result is directly traceable to causes existing in our laboratory. The transportation companies act as the agents of the purchaser, and we must refer our friends to them for reparation in case of loss. We shall be pleased to assist, when requested, in formulating claims, but cannot assume the responsibility of collecting them.

REMITTANCES

No allowance can be made by us for the expense of collection, whether remittance be made by draft, postal order or express. Money, stamps or postal notes sent by mail will be at the risk of the sender, and we cannot be held responsible for loss during transit.

DART DRUG

SUPER DISCOUNTS

THURSDAY, FRIDAY, SATURDAY, SUNDAY ONLY

8511 FENTON STREET
SILVER SPRING, Across from Hecht's
Open Monday, Thursday, Friday
12 Noon to 10 P.M.
Tuesday, Wednesday, 9:30-6:30
Saturday, 9:30-8:00
Sunday, 10 A.M. to 4 P.M.

18th and COL. RD. N.W.
WASHINGTON, D. C.
Monday Thru Friday
8 A.M. to 11 P.M.
Saturday, 8 A.M. to 11 P.M.
Sunday, 10 A.M. to 8 P.M.

2nd ANNIVERSARY DISCOUNT RIOT!

SAVE on PRESCRIPTIONS at DART!

DISCOUNTS on SPECIAL COMBINATIONS

Value		1 Comb.	3 for
1.59	59c Mennen's Skin Bracer and $1 Shampoo	.53	1.49
2.00	White Rain Shampoo (2/$1 size)	1.38	3.88
.86	Drene Shampoo (1/57c, 1/29c)	.52	1.49
1.29	Shasta Shampoo (1/$1, 1/29c)	.86	2.48
1.20	Pamper Shampoo (2/60c size)	.79	2.28
.59	Vitalis (2/29c size)	.39	1.13
1.30	Squibb's Dental Cream (2/65c size)	.88	2.54
.98	Pepsodent Tooth Paste (2/49c size)	.68	1.99
.98	Ammident Tooth Paste (2/49c size)	.59	1.72
.86	Mum Deodorant (2/43c size)	.62	1.79
1.58	Colgate Shave Bombs (2/79c size)	.99	2.88

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- G... Fresh, Original Manufacturer's Package ... No Rewards.
- Mail Orders Accepted at 18th and Col. Rd. Only. Add 3¢ Postage.
- Hundreds of Other Vitamins Not Listed at Equally Low Prices.

List Price		Size	Dart's Price	Three For
8.90	Vitamin "A", 50,000 units U.S.P.	100	$2.78	$7.49
4.90	Vitamin "A", 25,000 units U.S.P.	100	1.78	3.99
8.00	Vitamin "B-1", 100 mg. U.S.P.	100	2.78	7.99
4.50	Vitamin "B-1", 50 mg. U.S.P.	100	1.78	4.95
4.50	Vitamin "B-12", 25 mcg.	100	2.18	5.49
7.55	Vitamin "B-12", 50 mcg.	100	3.68	9.99
3.50	Vitamin "C", 250 mg. U.S.P.	100	1.68	4.48
2.35	Vitamin "C", 100 mg. U.S.P.	100	.86	1.99
5.00	Vitamin "E", 50 Int. units	100	2.58	6.99
7.50	Therapeutic Formula	100	2.78	7.99

Each capsule contains: Vitamin "A" 5,000 units U.S.P. Vitamin "D" 400 units U.S.P. Vitamin "B-1" 3 mg. Vitamin "B-2" 3 mg. Vitamin "C" 150 mg. Niacinamide

5.99	Rybutol Capsules	100	3.99	11.88
3.79	Oleum Percomorpheum	50cc	2.78	7.99
3.69	Poly-Vi-Sol (Mead's)	50cc	2.78	7.99
3.09	Tri-Vi-Sol (Mead's)	50cc	2.49	7.19
5.00	Geritol (Liquid or Tablet)		3.78	10.99
3.59	Miles One-A-Day Tablets	120	2.98	8.49
5.65	Multicebrin, Lilly	100	2.99	8.85
5.30	Trinsicon, Lilly	60	3.78	10.99
4.40	Homecebrin, Lilly	16 oz.	2.99	8.89
6.50	Reticulex, Lilly	100	4.78	13.99
8.40	Becotin with Vitamin "C", Lilly	100	5.58	16.39
3.11	Unicaps, Upjohn	100	2.39	6.99
6.60	Zymacaps, Upjohn	100	4.99	13.99
4.34	Zymadrops, Upjohn	60cc	3.49	9.99
2.25	Arcets, Walker	30	1.69	4.49
5.00	Vitamoids, Walker	100	2.69	7.49
10.50	Theragran, Squibb	100	5.66	16.25
10.98	Theragran M, Squibb	100	5.99	17.49
4.98	Rubragran, Squibb	60	3.64	10.99
9.97	Novagran, Squibb	100	6.69	18.99
6.75	Geriplex, Parke Davis	100	3.99	11.99
3.45	Abdol with Vitamin C, Parke Davis	100	1.99	5.69
4.32	Abdol with Minerals, Parke Davis	100	2.49	6.99
10.75	Myadec, Parke Davis	100	5.95	16.99
5.65	Abdec Capsules, Parke Davis	100	3.49	9.99
3.90	Abdec Drops, Parke Davis	50cc.	2.99	8.49
4.60	Palidec, Parke Davis	16 oz.	2.99	7.99
5.50	Dytrimin, Abbott	100	3.49	9.99
4.66	Vi-Daylin, Abbott	16 oz.	2.88	7.99
9.33	Iberal Filmtabs, Abbott	100	6.66	18.99
10.20	Optilets, Abbott	100	6.48	18.59
4.50	Duolets, Abbott	100	3.99	11.29
4.95	Surbex, Abbott	100	3.99	11.29
5.83	Viterra, Roerig	100	3.99	11.29
10.83	Viterra Therapeutic, Roerig	100	6.56	18.59
8.80	C.V.P. Capsules, U. S. Vitamins	100	6.99	19.89
3.98	Methicinol Capsules, U. S. Vitamins	100	2.99	8.69
4.50	Visvineral (Adult), U.S. Vitamins	100	3.29	8.59
3.20	Visvineral (Drops), U. S. Vitamins	45cc	1.88	5.59
5.90	Geviral, Lederle	100	5.38	15.88
5.42	Pronemia, Lederle	30	3.68	10.29
16.66	Pronemia, Lederle	100	11.28	32.99
4.20	Stresscaps, Lederle	30	2.68	7.99
6.50	Perihemin, Lederle	100	4.48	12.99
4.98	Prenatal (Capsules), Lederle	100	3.28	8.88
3.64	Lederplex (Capsules or Tablets)	100	1.93	5.68

DART WILL NEVER BE UNDERSOLD

3.50	Scotch Plaid Picnic Kooler Jug	1.99;	3 for 5.88
7.95	Hair Dryer with stand, ton-off switch	4.77;	3 for 12.99
49.95	20" Double Window Fan, guarant'd	21.88	
2.00	Metal Flashlight with Batteries	.78;	3 for 2.08
4.69	Hapalong Cassidy Vacuum Bottle	.88;	3 for 2.58
7.95	Aluminum Folding Chairs	3.99;	3 for 11.78
3.79	Plastic Garden Hose, 50 ft., guar.	1.99;	3 for 5.88
6.55	8" Electric Fan, guaranteed	3.78;	3 for 10.99
.99	Sinlac Powder, 16 oz.	.89	
2.00	DDT Spray Bomb	.68;	3 for 1.99
.63	Arrid Deodorant, large size	.39;	3 for 1.16
.59	Curad "Battle Ribbon" Plastic Strips	.29;	3 for .85
2.98	Lilly's Insulin, U-80 (Prot Zn. NPH)	1.99;	3 for 5.94
1.49	Lilly's Insulin, U-40 Prot Zn. NPH	.99;	3 for 2.94
.73	Eversharp-Schick Injector Blades, 20s	.58;	3 for 1.69
2.98	Para Moth Nuggets or Crystals, 5 lbs.	1.78;	3 for 5.19
.79	Para Moth Nuggets or Crystals, 1 lb.	.39;	3 for 1.14
.89	Listerine Antiseptic	.63;	3 for 1.83
1.00	Cepacol Antiseptic 16 oz.	.66;	3 for 1.88
2.00	Toni or Lilt Home Permanent	1.26;	3 for 3.74
1.69	Pedigree Dog Food	.83;	3 for 2.46
.49	Men's Wash Cloths	.03;	6 for .14
2.00	Nationally Famous Hair Spray Bomb	.68;	3 for 1.99

SUN GLASSES, Men's and Ladies' 1956 Models up to 70% Off

1.10	Sea and Ski Suntan Lotion	.88;	3 for 2.55
1.00	Breck Shampoo, Large Size	.58;	3 for 1.69

NEVER BEFORE! Lanvin Arpage Cologne, Gold Bottle, ... .38
2.00 Helene Curtis Spary Net .96; 3 for 2.85
Value to 2.50—Barber-Size Hair Spray ...

HARRY M. HILLS, CLERK

	100s	1.17;	3 for 3.37
.65	Alka Seltzer	.09	
.39	Alcohol, Isopropyl, 1 pint	.09	
1.00	JGJ Baby Oil, Lotion or Shampoo	.74;	3 for 2.16
2.00	Lustre Cream Shampoo	1.18;	3 for 3.46
.33	Listerine Antizyme Tooth Paste	.14;	3 for .36
1.23	Butterin Tablets, 100s	.88;	3 for 2.48
2.82	Bayer Aspirin, 100s	.39	
3.88	Sucaryl Sod Tablets, 1,000 (Abbott)	2.48;	3 for 6.99
.79	Saccharin, USP, 1,000s	.24;	5 for .99
.35	Kleenex, box of 400 (not 300)	.19	
.39	Kotex, box of 12	.29;	3 for .85
.65	Colgate or Gleem Tooth Paste	.46;	3 for 1.36
.98	Gillette Blue Blades, 20s	.68;	3 for 1.99

THIS COUPON WORTH 33¢
ON PURCHASE OF
SEALTEST ICE CREAM 1/2 GAL.
REG. $1.19
86¢
3—½ gals. 2.59

FRESH KODAK FILM—Color or Black & White

1.25	No. CU620	1.06;	3 for 2.88
3.75	No. K460, 8-mm. Mag., Color, 50 ft.	3.18;	3 for 9.38
2.40	No. K459, 8-mm. roll Color	1.99;	3 for 5.69
1.85	No. 135 (35-mm.) 20 Exp.	1.58;	3 for 4.26
.45	VP620	.35;	3 for .93
1.56	Westinghouse No. 5 Flash Bulbs, 12s	.99;	3 for 2.88

ALL KODAK CAMERAS AND SETS ... 25% OFF

● No Dealer Sales ● Quantity Rights Reserved ● Fed. Tax Where Applicable

DART DRUG

THURSDAY, FRIDAY, SATURDAY, SUNDAY ONLY
SAVE at DART on PRESCRIPTIONS

8511 FENTON STREET
SILVER SPRING, Across from Hecht's
Open Monday, Thursday, Friday
12 Noon to 10 P.M.
Tuesday, Wednesday, 9 30-6 30
Saturday, 9.30-8:00 P.M.
Sunday, 10 A.M. to 4 P.M.

18th and COL. RD. N.W.
WASHINGTON, D. C.
Monday Thru Friday
8 A.M. to 10 P.M.
Saturday, 8 A.M. to 11 P.M.
Sunday, 10 A.M. to 4 P.M.

COLOSSAL Vitamin Discounts

- *Guaranteed Fresh Original Manufacturer's Package. No Repacks.*
- *Mail Orders Accepted at 18th and Columbia Rd. Only. Add 25c Postage.*
- *Hundreds of Other Vitamins Not Listed at Equally Deep Discounts.*

List Price		Size	Dart's Three Price	For
3.11	UNICAPS, Upjohn	100	2.39	6.99
6.60	ZYMACAPS, Upjohn	100	4.99	13.99
4.34	ZYMADROPS, Upjohn	60cc	3.49	9.99
2.25	ADCETS, Walker	50	1.69	4.49
5.00	VITAMOLDS, Walker	100	2.60	7.49
10.50	THERAGRAN, Squibbs	100	5.66	16.25
10.58	THERAGRAN M, Squibbs	100	5.99	17.49
4.98	RUBRAGAN, Squibbs	60	3.64	10.48
9.97	NOVAGRAN, Squibbs	100	6.69	18.99
4.46	VI-DAYLIN, Abbott	16 oz.	3.39	9.49
5.77	DAYAMIN, Abbott	100	3.49	9.99
9.33	IBEROL FILMTABS, Abbott	100	6.66	18.99
10.50	OPTILETS, Abbott	100	6.48	18.59
6.00	DAYALETS, Abbott	100	3.99	11.29
4.95	SURBEX, Abbott	100	3.99	11.29

NATIONALLY FAMOUS VITAMINS

8.90	Vitamin "A", 50,000 units U.S.P.	100	$2.78	$7.49
4.90	Vitamin "A", 25,000 units U.S.P.	100	1.78	3.99
8.00	Vitamin "B-1", 100 mg. U.S.P.	100	1.99	5.48
4.50	Vitamin "B-1", 50 mg. U.S.P.	100	1.38	3.78
4.50	Vitamin "B-12", 25 mcg.	100	2.18	5.49
7.55	Vitamin "B-12", 50 mcg.	100	3.68	9.99
3.50	Vitamin "C", 250 mg. U.S.P.	100	.99	2.68
5.00	Vitamin "E", 50 Int. units	100	2.58	6.99
7.50	Therapeutic Formula	100	1.99	5.88

Each Capsule contains 25,000 units Vit. "A"; 1,000 units Vit. "D"; 10 mg Vit. "B-1"; 5 mg. Vit. "B-6"; 150 mg Vit. "C"; 150 mg. Niacinamide

5.83	Viterra, Roerig	100	3.58	10.49
10.83	Viterra Therapeutic, Roerig	100	6.56	18.59
3.50	C.V.P. Capsules, U. S. Vitamins	100	6.99	19.89
5.95	Methischol Capsules, U. S. Vitamins	100	2.99	8.69
4.90	Visyneral (Adults), U. S. Vitamins	100	3.29	8.59
3.20	Visyneral (Drops), U. S. Vitamins	45cc	1.88	5.59
7.90	Gevral, Lederle	100	5.38	15.88
5.42	Pronemia, Lederle	30	3.68	10.29
16.66	Pronemia, Lederle	100	11.28	30.99
4.20	Stresscaps, Lederle	30	2.68	7.99
6.50	Perihemin, Lederle	100	4.48	12.99
4.58	Prenatal (Capsules), Lederle	100	3.28	8.88
3.64	Lederplex (Capsule or Tablet)	100	1.93	5.69
3.45	ABDOL with Vitamin "C", P-D Co.	100	1.99	5.69
4.32	ABDOL with Minerals, P-D Co.	100	2.99	6.99
6.65	ABDEC Capsules, Parke-Davis Co.	100	3.49	9.99
9.90	ABDEC Drops, Parke-Davis Co.	50cc	2.99	8.49
10.75	MYADEC, Parke-Davis Co.	100	5.99	16.99
4.25	GERIPLEX, Parke-Davis Co.	100	3.99	11.39
10.02	PALADEC, Parke-Davis Co.	16 oz.	2.99	7.99
5.99	Rybutol Capsules	100	3.99	11.88
3.79	Oleum Percomorpheum	50cc	2.78	7.99
3.69	Poly-Vi-Sol (Meads)	50cc	2.78	7.99
3.09	Tri-Vi-Sol (Meads)	50cc	2.49	7.19
5.00	Gertol (Liquid or Tablets)		3.78	10.99
3.59	Miles One-A-Day Tablets	120	2.98	8.49
5.65	Multicebrin, Lilly	100	2.99	8.85
5.30	Transicon, Lilly	60	3.78	10.99
5.65	Multicebrin, Lilly	100	2.99	8.85
6.50	Reticulex, Lilly	100	4.78	13.99
8.40	Becotin with Vitamin "C", Lilly	100	5.58	16.39

DART WILL NEVER BE UNDERSOLD

75c Candettes Throat Lozenges, 10s ..... **57c, 3 for 1.47**
1.50 Bonadettes, for Motion Sick ..... **97c, 3 for 2.67**
1.23 Butternn Tablets, 100s ..... **88c, 3 for 2.48**
3.88 Succaryl Sod. Tablets, 1000s ..... **2.48, 3 for 6.99**
65c Colgate or Gleem Tooth Paste ..... **46c, 3 for 1.26**
98c Gillette Blue Blades, 20s ..... **68c, 3 for 1.19**
39c Pal Injector Blades, 10s ..... **27c, 4 for 97c**

79c 1/4 Gr. U.S.P.
SACCHARIN
24c—5 for 99c

29.50 Sunbeam Shavemaster or Schick "25"
ELEC. RAZORS
9.99 with Standard Elec. Razor trade-in

2.00 Toni, Lilt, Prom Home Perm. ..... **1.26, 3 for 3.74**
1.29 Simlac Powder, 1 lb. ..... **89c, 3 for 2.64**
2.00 Lustre Cream Shampoo ..... **1.18, 3 for 3.46**
2.98 Para Moth Crystals or Nuggets, 5 lbs. ..... **1.78 3 for 5.19**
All 5c Candy, Gum and Mints **3c**
79c Para Moth Crystals or Nuggets, 1 lb. ..... **39c, 3 for 1.14**

ROCKEFELLER DIET
DEXTROSE
Reg. 1.10 **46c** lb. **3** lbs. **1.28**

59c DR. WEST'S
Tooth Brushes
28c—4 for 99c

1.00 Breck Shampoo, regular size ..... **58c, 3 for 1.69**
Values to 2.50—Barber Size Hair Tonics, Vitalis
Kreml, Wildroot, etc. ..... **1.17, 3 for 3.37**
65c Alka Seltzer ..... **46c, 3 for 1.34**
1.00 J&J Baby Oil, Lotion or Shampoo ..... **74c, 3 for 2.16**

29c Isoprophyl U.S.P.
ALCOHOL
9c

29c 5 Gr. U.S.P.
ASPIRIN (100s)
9c

3.50 Breck Shampoo (full quart) ..... **2.38, 3 for 6.68**
1.35 Empirin Tablets, 100s ..... **86c, 3 for 2.55**
10c Tums, Antiacid Tablets. Ea. **5c**
39c Kotex, box of 12 ..... **29c 3 for 85c**
25c BC Powders ..... **15c, 3 for 44c**
29c Book Matches, box of 50. Ea. **9c**
7.95 Scotch Kooler, 1-gal. size ..... **3.99, 3 for 11.88**
7.95 Aluminum Folding Chairs ..... **3.38 3 for 9.88**
Orig. Gold Bottle, Lanvins "My Sin" Cologne ..... **1.88, 3 for 5.48**

35c Box of 400 (Not 300)
KLEENEX
19c

1.10 LENTHERIC
LIPSTICKS
28c—3 for $1.00

FRESH KODAK FILM—Color or Black & White

1.25 No. CU620 ..... **1.06; 3 for 2.88**
3.75 No. K460 (8-mm.) Mag., col., 50 ft. ..... **3.18; 3 for 9.38**
2.40 No. K459 (8-mm.) Roll Color ..... **1.99; 3 for 5.69**
1.85 No. 135 (35-mm.) 20 Exp. ..... **1.58; 3 for 4.26**
.45 VP620 ..... **.35; 3 for .93**
1.56 Westinghouse No. 5 Flash Bulbs 12s ..... **.99; 3 for 2.88**

ALL KODAK CAMERAS AND SETS ..... 25% OFF

No Dealer Sales • Quantity Rights Reserved • Fed. Tax Where Applicable

THURS., FRI., SAT., SUN.

DART DRUG

8511 FENTON STREET
SILVER SPRING, Across from Hecht's
Open: Monday, Thursday, Friday
12 Noon to 10 P.M.
Tuesday, Wednesday, 9:30 6:30
Saturday, 9:30 8:00 P.M.
Sunday, 10 A.M. to 4 P.M.

18th & Columbia Road
WASHINGTON, D. C.
Monday Thru Friday
8 A.M. to 10 P.M.
Saturday, 8 A.M. to 11 P.M.
Sunday, 10 A.M. to 8 P.M.

SAVE on PRESCRIPTIONS at DART!

BLOCK BUSTER VITAMIN RIOT

anteed Original Manufacturers Packages—No Repacks

Accepted at 15th and Col. Rd. Only. Add 25c Postage. Other Vitamins Not Listed at Equally Drop Discounts.

		Size	Dart's Price	Three For
	Vitamin "A" 50,000 units U.S.P.	100	2.78	7.49
.99	Vitamin "A" 25,000 units U.S.P.	100	1.78	3.99
.02	Vitamin "B-1" 100 mg. U.S.P.	100	2.48	6.99
4.50	Vitamin "B-1" 50 mg. U.S.P.	100	1.78	4.79
4.50	Vitamin "B-12" 25 mg.	100	2.18	5.49
7.55	Vitamin "B-12" 50 mg.	100	3.68	9.99
3.50	Vitamin "C" 250 mg. U.S.P.	100	1.58	4.48
5.00	Vitamin "E" 50 Int. units	100	2.58	6.99
7.50	THERAPEUTIC FORMULA	100	2.68	7.88

Each Cap. contains: 25,000 units Vit. "A"; 1,000 units Vit. "D"; 10 mg. Vit. "B-1"; 3 mg. Vit. "B-2"; 150 mg. Vit. "C"; 150 mg. Niacinamide.

13.50 THERA 12-M VITAMINS

100 HIGH-POTENCY THERAPEUTIC VITAMINS

COMPARE THIS FORMULA—Vit. "A", 25,000 units; Vit. "D", 1000 units; Thiamin. HC, 10 mg.; Riboflavin, 4 mg.; Pyridoxine HC, 1 mg.; Vit. "B-12", 3 mcgs.; Ascorbic Acid, 150 mg.; Niacinamide, 100 mg.; Calcium, 50 mg.; Phosphorus, 61.5 mg.; Iron, 10 mg.; Cobalt, .01 mg.; Potassium, 4.1 mg.; Molybdenum, 0.17 mg.; Zinc, per 2 mg.; Zinc, 15 mg.; Magnesium, 5.36 mg.

4.67 3 for 12.47

3.69	POLY-VI-SOL (Mead's)	50cc.	2.78	7.99
3.09	TRI-VI-SOL (Mead's)	50cc.	2.49	7.99
5.00	GERITOL (Liquid or Tablets)		3.76	10.99
3.59	Miles ONE-A-DAY Tablets	120	2.98	8.49
5.65	MULTICEBRIN, Lilly	100	2.96	8.85
5.30	TRINSICON, Lilly	100	3.66	10.78
6.50	RETICULEX, Lilly	100	4.78	13.99
5.99	RYBUTOL Capsules	100	3.99	11.88
10.50	THERAGRAN, Squibbs	100	5.66	16.25
10.98	THERAGRAN M, Squibbs	100	5.99	17.49
4.98	RUBRAGAN, Squibbs	60	3.64	10.48
9.97	NOVAGRAN, Squibbs	100	6.69	18.99

FAMOUS ABBOTT VITAMINS

4.46	VI-DAYLIN, Abbott	16oz.	2.88	8.28
5.77	DAYAMIN, Abbott	100	3.38	9.99
9.33	IBEROL FILMTABS, Abbott	100	6.66	18.99
10.50	OPTILETS, Abbott	100	6.39	18.29
6.00	DAYALETS, Abbott	100	3.99	11.29
4.94	SURBEX, Abbott	100	3.99	11.29
7.90	GEVRAL, Lederle	100	5.28	15.48
5.42	PRONEMIA, Lederle	30	3.59	10.29
16.99	PRONEMIA, Lederle	100	11.28	33.00
4.20	STRESSCAPS, Lederle	30	2.86	7.99
6.50	PERIHEMIN, Lederle	100	4.48	12.99
4.58	PRENATAL, Capsules, Lederle	100	3.19	10.88
4.40	VI-MAGMA, Caps., Lederle	100	2.99	8.59
3.64	LEDERPLEX Capsules or Tablets	100	1.86	5.55
5.95	METHISCOL Capsules, U.S. Vit.	100	2.99	8.69
4.50	VISYNERAL (Adults), U.S. Vit.	100	3.29	8.59
3.20	VISYNERAL Drops, U.S. Vit.	45cc.	1.88	5.59
8.25	VI-TRINS, Hematinic, U.S. Vit.	100	4.57	13.27
6.75	CLUSIVOL Capsules, Ayerst	100	5.88	16.99
7.75	BEMINAL FORTE, "C" Ayerst	100	5.99	16.99
3.11	UNICAPS, Upjohn	100	2.33	6.79
4.17	UNICAPS-M, Upjohn	100	2.99	8.48
6.25	UNICAP, Therapeutic, Upjohn	100	5.99	16.99
15.75	ZYMACAPS, Upjohn	250	10.99	30.99
6.60	ZYMACAPS, Upjohn	100	4.99	13.99
4.94	ZYMADROPS, Upjohn	60cc.	3.49	9.99
4.19	PRECALCIN, Caps., Walker		2.99	8.49
5.95	ADEXIN, Walker	50	1.69	4.49
9.75	VITAMORIN, Walker	100	2.69	7.49
3.29	VITERRA TABLETABS, Roerig	100	3.39	9.89
4.25	STIMAVITE, Roerig	30	2.48	6.99
3.45	VITTERRA, Roerig	100	3.38	9.99
10.95	VITERRA, Therapeutic, Roerig	100	6.56	18.59

DART WILL NOT BE UNDERSOLD

2.50 HELENA RUBINSTEIN Zipper Carryall, Cologne & Powder
Heaven Scent, Apple Blossom or White Magnolia
1.47; 3 for 4.27

2.00 CLEANSERS LENTHERIC
Night Work or Clean Up
27c; 4 for 97c

20.95 SCHICK ELECTRIC RAZORS, with trade-in	9.99
69c DR. WEST'S TOOTH BRUSHES	37c; 3 for 97c
79c ERONETTE GLOVES	63c; 3 for 1.99
9.95 GE SUN LAMPS	7.48; 3 for 21.99
8.99 No. 610 PAK-T-KAL VAPORIZERS	6.88; 3 for 19.48
4.95 No. 600 PAK-T-KAL VAPORIZERS	3.88; 3 for 10.78
6.95 HEATIN PAD, Not Famous, Guar.	3.47; 3 for 9.88
1.25 LADIES NYLON HOSE, 51-15	49c; 3 for 1.46
35c KLEENEX TABLE NAPKINS	3 boxes 48c
1.25 PEPTO-BISMOL with Aspirin	78c; 3 for 2.18
1.00 GILLETTE RAZOR with Blades	78c; 3 for 2.18
79c PALMOLIVE or COLGATE Shave Cream	68c; 3 for 1.99
25c CITRATE OF MAGNESIA	12c; 3 for 35c

1.25 LENTHERIC LIPSTICKS
27c; 4 for 97c
Complete Color Assr.

2.00 Helena Curtis or Breck SPRAY NET
96c; 3 for 2.85

1.00 BAN DEODORANT	68c; 3 for 1.99
65c COLGATE or GLEEM Tooth Paste	46c; 3 for 1.36
Values to 2.50—BARBER SIZE HAIR TONIC, Pinaud, Vitalis, Krem, Wildroot, Fitch, etc.	1.17; 3 for 3.37
5.00 VITAFLUFF SHAMPOO	2.67; 3 for 7.77
2.00 TONI HOME PERMANENT	1.26; 3 for 3.74
1.00 MISS CLAIROL, Regular	77c; 3 for 1.97

DISCOUNTS! On Famous COLOGNES and PERFUMES!
Original Sealed Manufacturers' Packages

Never Before! CHANEL No. 5 Cologne	2.67; 3 for 7.87
Never Before! SORTILEGE Cologne	2.47; 3 for 7.18
1.25 YARDLEY Cologne	94c; 3 for 2.68

Sheaffer's, Lanvin's, Arpege and many others at Dart's Discounts

1.00 LUSTRE CREME SHAMPOO	58c; 3 for 1.69
3.50 BRECK SHAMPOO, full quart	2.38; 3 for 6.68
1.00 BRECK SHAMPOO	58c; 3 for 1.69
1.00 ANAHIST TABLETS, Spray or Syrup	78c; 3 for 2.26
1.08 CORICIDIN TABLETS, 25s	78c; 3 for 2.18
4.17 CORICIDIN TABLETS, 100s	2.88; 3 for 7.99
1.23 BUFFERIN TABLETS, 100s	88c; 3 for 2.48

1.00 CEPACOL ANTISEPTIC 62c; 3 for 1.85
38c CEPACOL LOZENGES 27c; 4 for 99c

1.00 J&J Baby Oil, Lotion or Shampoo	74c; 3 for 2.16
25c EVENFLO NURSING UNITS	16c; 3 for 46c
1.09 SIMLAC POWDER, 1 lb.	89c; 3 for 2.60
1.00 JERGEN'S LOTION	78c; 3 for 2.26
2.16 PLOVAC Bulk Laxative	1.67; 3 for 4.67
29c RUBBING ALCOHOL, Isopropyl, 1 pt.	9c
10c SHOE LACES, 27-inch	2c
2.00 PAPERMATE Piggy Back Pens	1.28; 3 for 3.68

FRESH KODAK FILM—Color or Black and White

1.25 No. CU620	1.06; 3 for 2.88
3.75 K460, 18-mm.-1 Mag., col., 50 ft.	3.18; 3 for 9.38
2.40 No. 135, 35-mm.-1 20 exp.	1.58; 3 for 4.26
1.56 Westing. No. 5 Flash Bulbs, 12s	99c; 3 for 2.67
ALL KODAK CAMERAS AND SETS	**25% OFF**

1.00 Famous XMAS CARDS	29c; 4 boxes 99c
75c CANDETTES Throat Lozenges, 10s	57c; 3 for 1.49
1.50 BONADETTES, for Motion Sickness	97c; 3 for 2.67

35c BOX OF 400 KLEENEX
19c

39c BOX OF 12 KOTEX
29c; 3 for 85c

● Quantity Rights Reserved ● No Dealer Sales
● Federal ● Laws Where Applicable

[fol. 455] GOVERNMENT'S EXHIBIT No. 4

PARKE DAVIS VITAMINS

Full List	Minimum Resale	Bottle Size	Item	Selling Price For One	Three	Cost
13.50	12.15	100	THERA COMBEX	9.99	26.45	9.00
3.45	3.15	100	ABDOL "C"	1.99	5.69	1.52
4.32	3.89	100	ABDOL MINERALS	2.49	6.99	1.87
10.75	9.67	100	MYADEC	5.99	16.99	4.53
7.50	6.75	100	GERIPLEX	3.99	11.39	3.00
5.65	5.08	100	ABDEC CAPS	3.49	9.99	2.56
3.90	3.51	50CC	ABDEC DROPS	2.99	8.49	2.34
6.00	5.40	100	PALADEC	3.49	9.99	2.49
4.80	4.32	100	COMBEX	2.49	6.99	1.97
5.40	4.86	100	COMBEX "C"	2.99	8.49	2.28
1.65	1.48	100	NUTRITIVE CAP	.96	2.69	.70
4.73	4.25	100	NATABEC	3.99	10.99	3.15

[fol. 456] GOVERNMENT'S EXHIBIT No. 5

PARKE, DAVIS & COMPANY

Detroit 32, Michigan, U.S.A.

Executive Offices and Laboratories, Joseph Campau Avenue at the River

Kenneth D. McGregor, Vice President, Secretary and General Attorney

December 12, 1957.

Dart Drug Co.,
18th and Columbia Road,
Washington, D.C.

DEAR SIRS:

We have concluded that we do not wish to have any further business relations with Dart Drug Company. We are therefore closing your account permanently, effective immediately.

Yours very truly, Parke, Davis & Company, By Kenneth D. McGregor, Vice President, Secretary and General Attorney.

[fol. 457] GOVERNMENT'S EXHIBIT No. 6

July 3, 1956.

BROOKS BROWN,
RICHARD CUMMINGS.

That any direct account of Parke, Davis whether it be in Md., Virginia or D.C. which does not abide by minimum retail prices as listed in their catalog will be cut off from direct buying. Furthermore any wholesaler who sells a retail store below minimum retail prices as listed in our catalog will be cut off from direct buying. Mr. Cummings further informed me that this was a message directly from Mr. Loyne the pres. of Parke, Davis.

I, H. H. Haft informed Mr. Cummings in Mr. Brown's presence that Washington, D. C. is not a fair trade area & in my opinion the action constitutes price fixing in violation of certain antitrust statutes. I further informed Mr. Cummings that in no case would I raise our present price scale to the level of the minimum resale prices in their catalogue prior to such action being taken by Peoples Drug Stores, Inc., Standard Drug, Tates, Drug Mart Stores & Babbitts. I informed him that after speaking to these other retail outlets if he would inform me of their inten-
[fols. 458-459] tions I would give it due consideration & endeavor to cooperate with him.

Mr. Cummings informed me that he personally had this day spoken to Drug Mart Stores & would speak to Peoples & other representatives of Parke, Davis would contact the Whol. & Retailers in this area in reference to the questions raised above.

This memo was dictated approx. 5:15 Pm in the presence of M.N.T, Mr. Richard Cummings Parke, Davis Supervisor & Brooks Brown Parke, Davis Hosp representative this 3rd day of July 1956 & they were given the opportunity to make any corrections or additions to the above & they stated in substance that this was the message they delivered.

Signed H. H. Haft, Dart Drug Corp.

Nancy Toohy.

[fol. 460]

GOVERNMENT'S EXHIBIT No. 10

Date 1956	Evening Star			Washington Post		
	Dart	Drug Mart	Peoples	Dart	Drug Mart	Peoples
July 5		Drug Ad—P.D.	Drug Ad—P.D.			
6				Drug Ad—P.D.		**Drug Ad—No P.D.**
12	Drug Ad—P.D.	Drug Ad—P.D.	**Drug Ad—No P.D.**			
19		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**		
26		Drug Ad—P.D.	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**		
Aug. 2		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	Drug Ad—P.D.		
9	Drug Ad—P.D.	Drug Ad—P.D.	**Drug Ad—No P.D.**			**Drug Ad—No P.D.**
16		**Drug Ad—No P.D.**	**Drug Ad—No Discount**	Drug Ad—P.D.		
23		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	Drug Ad—P.D.		
30		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	Drug Ad—P.D.		
Sept. 6		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**		**Drug Ad—No P.D.**
13		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**		
20		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**			
27	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**			**Drug Ad—No P.D.**
Oct. 4		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**		**Drug Ad—No P.D.**
11		**Drug Ad—No P.D.**	**Drug Ad—No P.D.**	**Drug Ad—No P.D.**		**Drug Ad—No P.D.**

Explanation of Symbols

Drug Ad—P.D. = Parke Davis products advertised at cut prices.

Drug Ad—No P.D. = Drugs advertised without Parke Davis products.

(Here follows 2 photolithographs, side folios 461, 462)

(Cal. 461)

GOVERNMENT'S EXHIBIT No. 15

310A

FILED

HARRY M. HULL, CLERK

PARKE, DAVIS & CO.

Wholesale Drug Trade

BILLERS PRICE LIST

NUMERICAL INDEX, PAGES 41-54

SURGICAL DRESSINGS, PAGES 55-65

REVISED TO SEPTEMBER 15, 1956

FILED
SEP 1 1 1953
HARRY M. HULL, CLERK

WHOLESALE DRUG TRADE
SALES AND DISTRIBUTION POLICY

It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe the Net Price selling schedule in this Parke, Davis & Company Wholesale Drug Trade Billers' Price List and supplements, and who confine their distribution of Parke-Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions.

[fol. 463] GOVERNMENT'S EXHIBIT NO. 15

PARKE, DAVIS & COMPANY

Inter-Office Memo

To: Carl Johnson, Sales Manager.
From: Baltimore.
Date: 3/29/56.
Subject: Dart Drug, Washington, D. C.

DEAR CARL:

This is the account about which I made reference in two recent telephone conversations. This store, operated by a Washington, D. C. corporation, of which Harold Haft is a principal, aggressively promotes popular drug products at less than Minimum Fair Trade prices.

Since Fair Trade is not in effect in the District of Columbia his method of operation has not caused us any great trouble thus far. However, within the next thirty to sixty days he plans to open a similar type operation in Silver Spring, Md., using the name Dart Drug Company, but operated by a separate group incorporated *under State of Maryland regulations.*

Since Maryland is a 'Fair Trade' State, I sought your advice on just how to handle the situation and, in keeping with your suggestions, informed Mr. Haft that we'd insist on his maintaining Fair Trade prices at his Maryland location and that his failure to do so could result only in refusing to make our merchandise directly available to him at either his District of Columbia or Maryland locations.

Mr. Haft's reaction was to seek legal advice as to whether or not we might be in restraint of trade in refusing to sell the District of Columbia corporation for an infraction of regulations by—as he put it—a completely unrelated Maryland corporation. He tells me his attorneys are of the opinion that such an act would constitute restraint of trade and that he will accordingly take legal action if we refuse to make our merchandise available to him at the Washington unit.

Your reaction to this latest development will be appreciated.

Cordially, Sam.

SMD:t.

[fol. 464] GOVERNMENT'S EXHIBIT No. 16

April 6, 1956.

MR. CARL JOHNSON:

This is in response to Mr. Dripps' memo of March 29, addressed to you with respect to the Dart Drug Company.

The question raised is in substance whether we may lawfully refuse to sell a drug outlet in Washington, D. C., if another outlet in Maryland which is separately incorporated, but which is presumably owned and controlled by the same interests, fails to maintain Fair Trade prices.

The answer to this question is not clear but there is considerable doubt that we could legally cut off supplies to the District of Columbia outlet for failure of the Maryland outlet to observe Fair Trade prices.

In my judgment we could cut off the Maryland outlet if it did not observe the Fair Trade prices.

However, it it has been our policy not to sell to District of Columbia outlets failing to observe suggested reselling prices we could cut off this outlet for such failure.

The story of the matter, as briefly as I can state it, is that it is an actionable restraint of trade (except as such agreements are sanctioned by state Fair Trade Laws) to reach an agreement that a customer will observe resale prices. However, it is the right of a trader to adopt and follow a business policy of selling to those customers only who in fact do observe announced resale pricing policies.

In short, we may enforce an adopted policy arrived at unilaterally by which we announce that we will sell only to those outlets who observe the minimum retail prices set forth in our catalogue or supplements thereto.

The distinction is that we can lawfully say "we will sell you only so long as you observe such minimum retail prices" but cannot say "we will sell you only if you agree to observe such minimum retail prices," since except as permitted by Fair Trade legislations agreements as to resale price maintenance are invalid.

J. A. Bradshaw.

JAB:ph.

(Here follows 1 photolithograph, side folio 465)

...n 2, D. C.

WEEKLY BULLETIN October 24, 1955

FILED
SEP 17 1958
...M. PETERSEN, CLERK

PARKE DAVIS & CO.

Starting November 1, 1955, 2% Cash Discount will be de... from all Parke Davis & Co., products. Further, P. D. & Co. products will henceforth be removed from further participating discounts.

SCOTTS EMULSION
NEW PRICES

Small - Retail 98¢
Cost $7.84 Doz.

Large - Retail $1.79
Cost $14.32 Doz.

PEPSODENT
#730 BRUSH DEAL

FREE! Packed in every Pepsodent 59¢ Tooth Brush and 29¢ Child's Tooth Brush A DAVY CROCKETT RING!

List Price	$12.00
Less 7½% Whlsr. Disc. ($25 Order)	.90
	$11.10
Less 5% Special Davy Crockett Rebate when you send your invoice to Pepsodent. ...	.56
Your Cost	$10.54
Retail	$17.64
Your Profit	$ 7.10

* * * * * * * * * * * * * * * * * *

SPECIAL PEPSODENT DAVY CROCKETT SLICKER SET OFFER complete with coat and hat - $1.98 value for only $1.00 with the end flaps from a Pepsodent package.

AMITONE
2 BIG PROFIT DEALS
Oct. 1 through Nov. 12, 1955

1 Tin FREE with 11 24's

1 Bottle FREE with 5 100's

Cost - 1 Doz. Tins 24's - $ 3.06
Cost - 6 Bottles of 100's 4.63

JOHNSON'S WAX
6 in 1 PACK

6 Pts. Super Hard Gloss Glocoat
6-1 lb. Paste Wax
4 Pts. Beautiflor Wax
4 Pts. Cream Wax
4 Pts Jubilee
6-8 oz. Pride

PLUS FREE - 2-8 oz. Pride

Your Cost ..... $15.64 Ta

DIAL SHAMPOO
SPECIAL INTRODUCTORY OFFER

Regular 33¢ Bottle FREE with Purchase of $1.00 size.
Deal #387:
12 Banded units to case - 7 oz. Plastic and 1½ oz. Plastic

Deal #388:
12 Banded units to case - 7 oz. Glass and 1½ oz. Plastic

LIMITED SUPPLY ORDER NO...

LEDERLE

Items listed below will be detailed during the month of November.

ACHROMYCIN DIAMOX

PATHILON PERIMYCIN

PROMEMIA

CIBA

Items listed below will be detailed during the month of November.

DORIDEN

SERPASIL

SERPASIL-APRESOLINE

APRESOLINE

ELIXASIL

PYRIBENZAMINE

PRIVINE

[fol. 466] GOVERNMENT'S EXHIBIT No. 19

August 15, 1956.

To: Bill Department & Julius Oppenheim, Picking Department (Parke Davis), Telephone Department, Pat Rasa, Phil Levin.

All orders for Parke Davis Merchandise Requested by:

Dart Drug, Silver Spring, Md.

Dart Drug, 18th & Columbia Rd.

McReynolds Phcy., 18th & G Sts., N.W.

State Drug, 17th & Pa. Ave., N. W.
are not to be shipped under any circumstances.

They have been told that we cannot ship them Parke Davis merchandise.

David I. Estrin.

Please initial after reading and return to me.

HNG.

RRH.

TBL.

[fol. 467] GOVERNMENT'S EXHIBIT No. 20

PARKE, DAVIS & COMPANY

Executive Offices and Laboratories, Detroit 32, Michigan, U. S. A.

Office of the Manager
81 West Mosher St.

P. O. Box 1676
Baltimore 3, Md.
Madison 3-1061

September 25, 1956.

Mr. Herbert H. Haft, President,
Dart Drug Corporation,
18th & Columbia Road, N. W.,
Washington 18, D.C.

DEAR HERB:

Just a note to tell you that it's a pleasure to do business with a man of his word. Good luck to you.

Cordially, Parke, Davis & Co. Sam. S. M. Dripps, Manager, Baltimore Branch.

SMD:t.

[fol. 468] GOVERNMENT'S EXHIBIT No. 21

PARKE, DAVIS & COMPANY

To: Mr. Carl Johnson, Sales Manager, Detroit.

From: Baltimore Branch.

Date: Nov. 21, 1956.

DEAR CARL:

It looks as though the minimum retail price situation in Washington, D. C., has blown up again. The Standard Drug advertised Abdol with Vitamin C and Abdec Drops below minimum retail prices and Herb Haft of Dart Drug indicates he intends to follow suit.

Just thought I'd better keep you advised.

Cordially,

SMD:gb.

(Here follow 4 photolithographs, side folios 469, 470, 471, 472)

THE EVENING STAR B-21
Washington, D. C.
Thur

GOVERNMENT'S EXHIBIT No. 22

DRUG MART

INC. STORES

Your Independent Druggist Where Low, Low Prices Always Prevail

CHOICE OF
Sliced Egg, Frankfurter, American Cheese, Minced Ham or Lettuce and Tomato Sandwich.
Pie or Cake, Iced Tea, Coffee or Pepsi
39¢

DRUG MART SPECIAL

Reg. 63c
ARRID
Cream Deodorant
Drug Mart Special **47¢** plus tax

BRISK
Fluoride
TOOTHPASTE
Economy Size **69¢**
Giant Size **53¢**

Lose weight safely...
AYDS
$2.98 Vitamin Candy
Mart Drug Special **2.49**

$1.48 Economy Size
KOTEX
Box of 48
Drug Mart Special **1.09**

MID-AUGUST SPECIALS

on Drug, Vitamin & Household Needs
Thurs., Aug. 16 thru Sat., Aug. 18

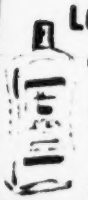
The Man in White . . .
is one of the most important people in your life. He is your friendly independent Drug Mart Pharmacist who stands with your family doctor to keep you healthy and happy. Best of all, he's your neighbor, the man who owns and operates your local Drug Mart store. His knowledge, experience and personal attention to your needs makes him your best friend

Free Prescription Pick-up and Delivery at All Drug Mart Stores!

ALL 5c CHEWING GUM, MINTS or FRUIT DROPS
3 for 11¢
Drug Mart Special

Squibb
THERAGRAN M CAPSULES
Reg $9.89 **5.95**
Drug Mart Special

98c Johnson's
BABY LOTION

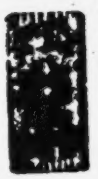


77¢
Drug Mart Special

Reg. 55c
Q-TIPS
46¢
Drug Mart Special

Reg. 98c Package of 20
Gillette Blue Blades
Drug Mart Special **20 for 73¢**

73c Eversharp-Schick Injector Razor Blades
Drug Mart Special **20 for 59c**



New Idea in Hair Sprays!

SUMMER SPECIALS ON

AT ALL DRUG MART STORES

IN WASHINGTON
SOUTHEAST
4141 Wheeler Rd SE

Reg. 98c Package of 20
Gillette Blue Blades
Drug Mart Special **20 for 73¢**

73c Eversharp-Schick Injector
Razor Blades
Drug Mart Special **25 for 59c**

ALL 5c CHEWING GUM, MINT or FRUIT DROPS
3 for 11¢
Drug Mart Special

Reg. $9.95 **5.93**
Drug Mart Special

New Idea in Hair Sprays!
Helene Curtis
purse spray
Refillable Aerosol
Plus filler can
Reg. $3.00 Value **1.85**
Drug Mart Special

SUMMER SPECIALS ON
VITAMINS

Reg. $3.98
Vitamin B-1 **1.85**

Reg. $3.50
Vitamin C **1.67**
250 mg. for Hay Fever and Asthma relief

Reg. $5.95
Therapeutic **2.75**

Reg. $6.95
Vitamin B-1 **2.59**
100 Mg.

$1.98 Vitamin C 100 mg **85¢**
Drug Mart Specials

Regular $1 Jar
NOXEMA SKIN CREAM
Drug Mart Special **89¢**

Regular 98c
FASTEETH
Holds False Teeth
Drug Mart Special **73¢**

The NEW Toothbrush!
ORAL "B" TOOTHBRUSH
Designed to meet professional requirements.
50¢ 75¢
Drug Mart Special

$2 Bottle
All Scents
COTY
TOILET WATER
Drug Mart Special **1.73**

Tampax
Junior • Regular
Super Sizes
Reg. 39s 10's **31¢**
Reg. $1.38 40's **1.13**
Drug Mart Special

IN WASHINGTON

• SOUTHEAST •

*4141 Wheeler Rd. S.E.
*1932 Nichols Ave. S.E.
*1355 Savannah St. S.E.
*3039 Naylor Rd. S.E.
*701 N. Carolina Ave. S.E.
*3rd and Pennsylvania Ave. S.E.
2921 Nichols Ave. S.E.

• NORTHWEST •

7th and E Streets N.W.
*New Hampshire and Farragut N.W.
4455 Conn. Ave. N.W.
*17th and Park Rd. N.W.
1701 Penna. Ave. N.W.
*1400 14th St. N.W.
*4940 Wis. Ave. N.W.
18th and G Streets N.W.
8527 Conn. Ave. N.W.
7th and P Streets N.W.

• NORTHEAST •

*1901 Michigan Ave. N.E.
*4th and Rhode Island Ave. N.E.
1301 Rhode Island Ave. N.E.
1609 Montello Ave. N.E.
2011 Bunker Hill Rd. N.E.

AT ALL DRUG MART STORES

IN MD. AND VA.

• EAST PINES MD •
6007 Sixty Sixth Ave.

• KENSINGTON MD •
7327 Landover Road

• DISTRICT HEIGHTS MD •
Marlboro Pike and Silver Hill Road

• HILLCREST HGTS MD •
2334 Iverson Street

• ROCKVILLE MD •
*214 E. Montgomery Ave.

• SILVER SPRING MD •
9400 Georgia Ave.
Piney Branch Road and Flower Ave.

• ALEXANDRIA VA •
1515 Mt. Vernon Ave.

ARLINGTON
4704 Columbia Pike
1219 N. Glebe Road

*Prepaid Money Orders may be purchased at the DRUG MART. Some varieties may be sold out. Limit may be in any store.

[fol. 471]

THE EVENING STAR
Washington, D. C.
Thursday, August 16, 1956

Laxative Pills

Edwards Olive Tablets, 75's	59c
Alophen Tablets, 100's	49c
Carters Little Liver Pills	98c
Feenamint, 36's	64c
E-Z Tablets, Box of 60	50c
Espotabs, Box of 50	59c
Veracolate Tablets, 50's	94c
Ex Lax, Box of 48	68c

Laxatives, Liquid

Milk Magnesia, Grahams, pint	39c
Squibbs Mineral Oil, pint	69c
Pluto Water, 23 ounces	62c
Nujol, 1 pint	69c
P.B. Petrolatum, light, pint	72c
Albolene Liquid, pint	69c
Mineral Oil Peoples, 16 ounces	59c
Castoria, Regular Size	39c

Nasal Preparations

Vapex Inhalant, ½ ounce	79c
Mistol Drops, ½ ounce	43c
N.T.Z. Nasal Spray, 20 cc	$1.43
Vicks Va Tro Nol Drops	37c
Vapocefrin Solution, 7½ cc	$2.00
Mistol Nasal Mist, 15 cc	98c
Neo Synephrine Nasal Spray	$1.25
Keys Nose Drops, ½ ounce	35c

For Coughs & Colds

Creomulsion, 3 ounces	57c
Rem, 6 ounces	98c
Sedatole, 4 ounces	98c
Sherocol, 4 ounces	84c
666 Tablets, 12's	23c
Tabcin Tablets, 12's	49c
Groves Bromo Quinine, 16's	49c
Super Anahist Syrup	98c

Vitamin Capsules

Abdec Kapseals, 100's	$5.98
Abbott Dayamin, 100's	$5.19
Neptune Plus, 100's	$5.74
Mead's Mixed Vitamins, 25's	$1.43
Rybutol Gelseals, MP, 25's	$1.98
Squibb Theragran, 30's	$2.69
ViSynerol, adult, 100's	$4.98
Beta Perles w/Vitamin E, 100's	$4.29

Liquid Vitamins

Thompson's Cod Liver Oil, pint	$1.39
Parke Davis ABD Drops, 15 cc	$1.21
Aquasol ACD Drops, 30 cc	$2.19
Abbott's Decon w/dropper	$1.49
Mol Iron Drops, 50 cc	$1.35
Multi Beta, B-12, 15 cc	$1.59
Thompson's Advita, 25 cc	$1.79

For Indigestion

Gelusil, 12 ounces	$1.49
Maalox Tablets, 100's	$1.43
Amitone Tablets, 100's	$1.39
Bicodol Powder, 5 ounces	89c
Gel-Bis-Mia, 3 ounces	83c
Pepto Bismol, 4 ounces	98c
Gelusil Tablets, 100's	$1.33
Amphojel Tablets, 36's	45c

Bulk Laxatives

Metamucil, 16 ounces	$2.89
P. B. Sibila, 4 ounces	$1.21
Konsyl, 12 ounces	$2.25
L. A. Formula, 14 ounces	$2.25
Konsyran, 7 ounces	$1.69
Molassco Tablets, 65's	98c
Saraka, 10 ounces	$1.49
Mucilose Flakes, 4 ounces	$1.35

[fol. 473] GOVERNMENT'S EXHIBIT No. 23

cc: Mr. C. Johnson.

J. A. Bradshaw, Assistant General Attorney

Nov. 14, 1956.

Mr. S. M. Dripps,
Branch Manager,
Baltimore Branch.

DEAR MR. DRIPPS:

Some time ago we received from you a list of questions which had been submitted to you by an F.B.I. Agent in connection with an investigation by the Department of Justice of alleged violations of the federal antitrust laws with respect to the wholesale drug industry. It is suggested that the answers to these questions should be as follows:

1. The minimum resale price policy of Parke, Davis & Company went into effect prior to January 1, 1954 and remains in effect to this date.
2. The policy originated at the home offices of the company. Branch managers were advised of it at annual sales meetings.
3. The policy applies to the entire geographical area of the Baltimore Branch area.
4. Drug retailers are acquainted with the policy by inclusion of explanatory material in catalogues and by sales representatives.
5. No particular policing methods are used other than by salesmen contacts.
6. No.
7. No.
8. ——.
9. ——.
10. See attached list.
11. ——.

You may state that you were requested to submit this list to Detroit and that the answers to the first seven questions were prepared in Detroit. We were unable, of course, [fol. 474] to provide the answers to questions 8, 9 and 11 and you will have to do it locally. I presume that the

er for 8 is "yes", but we, of course, do not necessarily the identities of those to whom a refusal may have made.

resume that 9 will have to be answered substantially we have, in the sense that the policy has been ex- d and the retailers advised that a refusal to follow uld result in our stopping direct sales.

response to 11, I know of no documentary material than the catalogue statements, copy of which you f course make available to the investigator.

you have any question at all concerning the foregoing you believe the answers inaccurate, I should like you ck with us before providing your answers to the in- ator. I believe, however, that the foregoing is com- y accurate.

Yours very truly, J. A. Bradshaw,

me.

th respect to item 10, if street addresses are re- d you, of course, will have to furnish them locally.

175] E. *Investigation Requested in Maryland.*

The date the minimum resale price policy went into and whether the policy is still maintained by the ny.

Whether the minimum resale price policy originated national office of Parke, Davis & Co. and if so, how e policy transmitted to the regional office.

Whether the minimum resale price policy applies to ire geographical area of the Baltimore, Maryland l office or whether it is confined to Maryland, Vir- d the District of Columbia.

he method used by Parke, Davis & Co. to notify g retailers of the company's minimum retail price

he methods used by Parke, Davis & Co. to police l market price.

hether Parke, Davis & Co. submitted a list of ailers to wholesale drug companies with instruc- such wholesale drug companies to refuse to sell

Parke, Davis & Co. products to such drug retailers as appeared on the list. If so, obtain the names and addresses of the drug retailers on the list and the names and addresses of the wholesale drug companies receiving the list.

"(7) Whether Parke, Davis & Co. advised any wholesale drug companies that if the wholesale drug company sold Parke, Davis & Co. products to any drug retailer on the Parke, Davis & Co. "cut-off" list, such wholesale drug company would be refused further supplies from Parke, Davis & Co.

(8) Did Parke, Davis & Co. refuse to sell its products to any drug retailer or wholesale drug company in connection with the enforcement of its minimum resale price policy, and if so, obtain the name and address of such retailer and wholesaler.

(9) Has Parke, Davis & Co. attempted to persuade any drug retailer not to advertise Parke, Davis & Co. products at prices below the suggested minimum resale price set by Parke, Davis & Co.

(10) Obtain a list of wholesale drug companies who distribute Parke, Davis & Co. products in the geographical area under the control of the Baltimore, Maryland regional office.

(11) Documentary material relating in any way to the establishment and maintenance of the minimum resale price policy of Parke, Davis & Co.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 803329 1341

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 10 1958
JAMES R. BROWNING, Clerk

No. [redacted]-20

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
W. LOUISE FLORENCOURT,
Attorneys,
Department of Justice, Washington 25, D. C.

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Miscellaneous:

CCH Trade Reg. Rep., ¶¶ 3003, 3085	17

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion, findings, and conclusions of the district court (Appendix A, *infra,* pp. 22–38) are reported at 164 F. Supp. 827.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 4. The judgment of the district court (Appendix B, *infra,* p. 39) was entered on July 16, 1958, and the notice of appeal was filed on September 11, 1958. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17

of the Act of June 25, 1948, 62 Stat. 989. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485; *United States* v. *McKesson & Robbins*, 351 U. S. 305.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 3 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 3, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in * * * the District of Columbia, or in restraint of trade or commerce * * * between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in

equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

The Government's evidence in a Sherman Act civil suit charging a manufacturer with illegal resale price maintenance showed that, in areas which have no "fair trade" laws, the manufacturer had (1) refused to sell directly to retailers who failed to observe the manufacturer's minimum resale prices and/or advertised discount prices on such products, (2) induced and compelled, and obtained agreement from, its wholesale distributors to stop selling to such price-cutting and discount-advertising retailers, and (3) resumed selling to the retailers after they had ceased price cutting or discount advertising and, in some instances, had agreed with the manufacturer to stop advertising discount prices. The evidence further showed that the defendant had terminated these practices prior to trial, after the Government had instituted its Sherman Act investigation and in part as a result thereof. The following questions are presented:

1. Whether the district court erred in holding that these practices constituted merely unilateral action by the manufacturer in selecting its customers, which is permissible under *United States* v. *Colgate & Company*, 250 U. S. 300, and not a price-fixing conspiracy between the manufacturer and the retailers and wholesalers.

2. Whether the district court further erred in holding, as an alternative ground for dismissing the complaint, that no relief was necessary because there was

"no reasonable probability" that the defendant would resume its attempts to maintain resale prices.

STATEMENT

On May 2, 1957 the United States filed a civil suit under Section 4 of the Sherman Act charging that Parke, Davis & Co. ("PD") had violated Sections 1 and 3 of that Act by conspiring to fix wholesale and retail prices of pharmaceutical products which it manufactures.[1] The principal alleged terms of the conspiracy were (1) that certain retail drug stores in Washington agreed with PD (a) not to sell PD's products at less than the resale prices which it fixed and (b) not to advertise such products at discount prices; and (2) that five wholesale druggists (three in Washington and two in Virginia) agreed with PD not to sell PD products to retail druggists who sold or advertised such products at discount prices (Pars. 13–15). Both the retailers and the wholesalers were named as coconspirators, but not defendants.[2]

At the conclusion of the Government's evidence, the district court granted the defendant's motion to dis-

[1] The complaint also alleged (in a separate count, Pars. 18–22) that pursuant to a conspiracy with PD, another drug wholesaler had agreed to discontinue granting discounts or dividends to retailers on PD pharmaceutical products. Before trial, the Government dismissed this count with prejudice, because it concluded that the pertinent evidence thereunder "properly belonged under this first cause of action" (Tr. 249; see Tr. 248).

[2] Prior to the filing of the suit, PD and two of its officials had been indicted for the same violations of the Sherman Act. At the close of the Government's case, the court directed a verdict of acquittal. *United States* v. *Parke, Davis & Company*, D. D. C., Cr. 444–57.

miss and entered judgment of dismissal. The court held (Tr. 448) that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint." It ruled that there were no agreements between PD and its retailers and wholesalers, and that PD's actions "were properly unilateral and sanctioned by law under the doctrine laid down in the case of *United States* v. *Colgate & Company,* 250 U. S. 300" (*infra,* p. 24). The court further held, as an alternative ground for dismissal, that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed," and that there was "no reasonable probability or danger" that the practices would be resumed.

The facts[3]

PD manufactures and sells approximately 600 different pharmaceutical products (Fdgs. 1, 2). It distributes these products to drug wholesalers and retailers in the District of Columbia and Virginia through its Baltimore, Maryland branch office (Fdg. 1). Retailers may buy PD products either directly from it or through wholesalers; on many items, its own prices are "substantially" lower than the wholesalers' (Tr. 27, 91; Fdg. 5).

PD has unilaterally established minimum wholesale and retail resale prices (Fdg. 7). Its retail catalogue stated that the "Minimum Retail Prices" therein set

[3] The statement of the facts is based upon the testimony and documentary evidence introduced by the Government, and certain unchallenged findings of the district court. Except where otherwise indicated, we believe that this evidence is substantially uncontradicted.

forth were also "suggested" for use in states which had not enacted "Fair Trade" laws (Fdg. 8). During the period covered by the complaint, there was no "fair trade" law in effect in the District of Columbia or Virginia (Fdg. 6). PD's wholesale catalogue stated that it was the company's "policy" to sell to wholesalers who observed the "Net Price Selling Schedule" therein set forth (Fdg. 9). It was also the company's "accepted custom" "that the wholesalers will not sell to retailers to cut prices" (Tr. 361–362); the wholesalers, however, had never been aware of such "custom" (Tr. 210–211, 278, 294–295, 365).

In the Spring of 1956, the manager of PD's Baltimore branch office was aware that certain retailers in the District and Virginia were advertising and selling PD products below the "suggested" resale prices (Tr. 364; GX 15). However, at that time he did not know of any company policy not to sell to price-cutting retailers in non-"fair trade" areas (Tr. 362–364, 407). He first learned of such policy from the President of PD at a branch managers' meeting in June, 1956, at the company's main office in Detroit (Tr. 364–365). After that meeting, he instructed his field manager for Washington and Virginia "to contact these price-cutting retailers and tell them if they did not observe your [PD's] prices they would be cut off," and also "[i]nstructed him to go to the wholesalers and say 'We don't want you to sell to these price-cutting retailers'" (Tr. 366–367, 401–402).

The field manager carried out his instructions. Early in July, 1956, he (and/or other PD represent-

atives) visited the five retailers which had been advertising and selling PD products at cut rate prices,[4] and told them that unless they ceased doing so, they would be cut off, both on direct purchases from PD and on purchases through wholesalers (Tr. 29, 99–101, 129–130, 185–186, 192–193, 194, 315–G). For example, Haft, the operator of Dart Drugs, was told that, pursuant "to a new policy that Parke Davis was going to set up * * * if I did not raise my prices from the discount level to the minimum resale [prices], they would no longer ship me merchandise and that they would see that the wholesalers who they dealt with would not ship me merchandise; they would cut off the wholesalers from buying from Parke Davis" (Tr. 29). The PD representative also stated "that he had already that day contacted Drug Mart Stores" and "had told them the same thing; they would be cut off from their source of supply if they didn't bring their prices up—and they had indicated they would raise their prices" (Tr. 29–30); and that "they would go to Peoples Drugstores, to Tate's Drugstores, to Standard Drugstores, to Babbitt's stores, and anyone else that was applicable in this area" (Tr. 31).[5]

[4] The five price-cutting retailers were Dart Drug, Standard Drug, State Drugs, Babbitt's, and McReynolds Pharmacy (Tr. 369). There was some price-cutting by Peoples Drug Stores, but after a PD representative advised a vice-president of Peoples (Tr. 320) that it would be cut off if it continued to cut prices, Peoples stated it would "go along with" PD's "plan" (Tr. 346).

[5] In the summer of 1956 a PD representative told the coordinator of the Drug Mart, a group of 30 independent drug stores "who got together to advertise and buy cooperatively"

Despite these threats, the retailers continued to advertise and sell PD products at discount prices (Fdg. 13). PD then stopped selling directly to them (Tr. 32, 33, 102, 315-C, 324, 325, 369). PD also instructed or requested its wholesalers in Washington and Richmond not to sell PD products to them (Tr. 47–48, 49, 92–A, 104, 126, 145, 167–168, 196–197, 203, 204, 213, 279–280, 296, 298, 300, 315–D, 324), and informed the wholesalers "that they were visiting all wholesalers in this area on the same problem" (Tr. 147; 279–280). The wholesalers were aware that if they continued selling to the price-cutting retailers, they would, in turn, be cut off by PD (Tr. 154, 304, 397). One of the wholesalers "agreed to abide by their request" (Tr. 280). The wholesalers "cooperated" with PD (Tr. 315-D; 369), and refused to fill the retailers' orders for PD products (Tr. 43, 48, 103, 106, 122–123, 131–132, 216),[6] marking the orders as "Out" even though they were in stock (Tr. 50, 103, 123, 181–183, 285, 312–313).[7] As a result, with one brief exception,

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(Tr. 184, 106–108), that "Peoples was going to stop cutting prices, or had stopped cutting prices * * * and asked me whether we would go along. He also said at the time that, if we did not stop cutting the price, that P–D would find a way to cut our stores off from direct buying, or from buying the P–D products. I told him at the time that I would go along with him; that, as long as Peoples went along, I would go along" (Tr. 185–186; see, also, Tr. 108). Drug Mart discontinued its cut rate advertising (Tr. 186–187, 190, 108–109, 110–111, GX 7).

[6] Two of the wholesalers testified that, had it not been for PD's actions, they would not have cut off the retailers (Tr. 176–177, 219).

[7] Although the wholesalers instructed their personnel not to fill PD orders for the retailers (Tr. 147–148, 150, 180–181, 214,

the five retailers were cut off on PD products for approximately seven weeks in July and August, 1956 (Tr. 51, 124, 133, 327, 373).[8]

On August 28, 1958, the manager and assistant manager of PD's Baltimore office visited three of the retailers in Washington who had been cut off—Dart, State and McReynolds (Tr. 327, 332, 333, 373–374, 378–380). They asked Haft of Dart "if I had had enough, if I was willing to agree to their terms * * * they said if I would discontinue advertising, as per the former agreement, take the signs out of the window * * * that they would resume shipment * * * (Tr. 53).[9] Haft "discontinued advertising, took the signs off the window, and took the cards out of the window * * * (Tr. 54), and he was then "able to obtain Parke Davis products direct from the company"

281, 300, 311–312), a few orders might have "slipped through" (Tr. 281–282, 307, 373) or have been filled by "mistake" (Tr. 154; see also, Tr. 87–89, 125–126). In addition, one of the wholesalers in Richmond, Virginia, apparently did fill orders for one of the retailers (Tr. 204).

[8] A couple of weeks after Dart Drugs had been cut off on July 3, 1956 (Tr. 51), PD's Baltimore office told Haft that if he "would stop advertising" cut rate prices, PD would resume selling to him, and that if he stopped, "everyone else would" (Tr. 318, 331, 36-37). Haft "agreed to stop the advertising" (Tr. 36). From July 19 to July 27, 1956, Dart Drugs again received some shipments from PD (Tr. 51, 37, 318). However, it was again cut off a couple of weeks later when, following a complaint by Haft that other stores were again advertising discounts, Dart Drugs also resumed such advertising (Tr. 38–39, 318–319).

[9] The PD officials testified that the suggestion to discontinue advertising was not made by them, but by Haft (Tr. 330, 332–333, 375).

and also from the wholesalers (Tr. 55).[10] The PD officials also stated "that they had gotten Standard Drug, Babbitt, Tates, Peoples and all the rest of the retailers back in line * * * in reference to advertising and window displays on Parke Davis items" (Tr. 54–55), and that "everyone else would stop advertising" (Tr. 73). Haft gave the PD officials "his word on the 28th of August that he would not advertise cut prices" (Tr. 378, 53; GX 20).[11]

The PD officials asked the operator of State "if I would be willing to take my prices down and of course sell it on the inside [at cut prices] if the other so-called discount stores ceased advertising in the paper, and I informed him that I would be very happy to; I would agree to that" (Tr. 133). Approximately a week later the PD officials returned and indicated "that everything was O.K. and that I accepted, and of course I assumed that meant that I could take my signs down and sell the vitamins at reduced prices on

[10] On December 12, 1957, after Haft had testified in the criminal case which resulted in acquittal (see *supra*, note 2), PD advised him by letter (GX 5) that it would no longer sell directly to him (Tr. 66–68). Since that date, Haft has been obtaining PD products only from wholesalers—but at "substantially higher" prices than on direct sales from PD (Tr. 91).

[11] The reason that PD was so anxious to stop the cut-rate advertising is explained in the testimony of Powers, the assistant manager of the Baltimore branch office. He stated that PD "never had any problem" with price cutting in the area until the "widespread newspaper advertising" began (Tr. 315–H); that if they could control the advertising "it would take the bang out of it, or the so-called impetus that advertising was causing" (*ibid.*), and would give PD "some measure of control over the price situation" (Tr. 315–K); and that the advertising was "demoralizing" (Tr. 315–J). See *infra*, p. 17.

the inside, which I proceeded to do" (Tr. 134–135). Similarly, the PD officials told a McReynolds partner that "If you fellows would be willing to go along to the extent, since you do not advertise in the newspaper, if you would just take your signs down, we could again do buying and business together" (Tr. 115). After McReynolds "agreed temporarily that we might take these signs down" (*ibid.*) and "stop[ped] all of our signs which was the only extent of our advertising," it was "then able to buy direct from Parke, Davis again" (Tr. 116).[12]

On August 28, 1956, or shortly thereafter, the Baltimore manager advised all the wholesalers that "they could again sell to these retailers" (Tr. 380–381; see Tr. 55, 153, 170, 218, 302–303, 336). Except for one ad, for several weeks thereafter there was no cut rate advertising in the Washington newspapers by the retail drug stores which previously had been cut off (Tr. 381), or by Peoples (Tr. 111, 113) or Drug Mart (Tr. 185–186, 326–327) (see notes 4, 5, *supra*). Such advertising was not resumed in the District until November, 1956 (Tr. 56, 381–382).

[12] One of the PD officials testified that, after telling the State operator that Haft had suggested stopping advertising, he asked him "would they want to go along on such a policy as that or such a plan," and the State man indicated that "it was acceptable" to him (Tr. 332–333). Similarly, he testified that the McReynolds representative stated that "if Dart would not advertise, we are interested in doing business with you and we will take our signs out of the windows" (Tr. 334). See also Tr. 378–380 for further testimony that the PD officials told State and McReynolds that Dart had agreed to stop advertising.

The decision of the district court

In holding that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint" (Tr. 448), the district court stated (*infra*, pp. 23–24) that PD had "well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell"; that PD's representative "notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy"; that the representatives "likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant"; that "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others"; and that "both wholesalers and retailers valued defendant's business so highly that they acceded to its policy." The court concluded (*infra*, p. 24), that "there was no coercion by defendant or no agreement with co-conspirators," and that PD's "actions * * * were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U. S.* v. *Colgate & Company*, 250 U. S. 300." [13]

[13] In its findings, the court found (Fdgs. 21-23) that PD did not solicit any agreement with Drug Mart, Standard Drug or Dart Drug with respect to prices or advertising, and that neither Drug Mart nor Standard entered into any such agreement with PD.

The court further ruled that in the fall of 1956 PD "abandoned in good faith its efforts to maintain resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products" in the District or in Virginia. The court stated (*infra*, p. 25) although PD's assistant general attorney had testified that its abandonment of attempts to enforce fair trade prices in the District was "in some measure" the result of PD's having learned of the Department of Justice investigation of the matter, that it was "evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field." The court found (Fdg. 27) that "[t]here is no proof or indication of any intention on the part of Parke, Davis to resume" its "efforts" to "compel the cessation" of retail price cutting in the District and Virginia. The court concluded (*infra*, p. 25) that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from doing as alleged where there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated, would be an empty gesture."

THE QUESTIONS ARE SUBSTANTIAL

1. The holding of the district court that PD's action to eliminate price competition in non-"fair trade" areas amounted to no more than a "unilateral" selec-

tion of customers which is permissible under *United States* v. *Colgate & Co.*, 250 U. S. 300, ignores the distinction which this Court has drawn "between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices * * *." *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 729. While *Colgate* indicates that "a simple refusal to sell to customers who will not resell at prices fixed by the seller is permissible under the Sherman Act" (*id.*, at 721; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 454), the seller "may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade" (*Beech-Nut* case, *supra*, p. 453; *Bausch & Lomb* case, *supra*, p. 722). And, as this Court indicated less than a year after the *Colgate* decision, an illegal agreement "between the seller and purchaser to maintain resale prices" (*Bausch & Lomb*, *supra*, p. 721) may be "expressed or implied from a course of dealing or other circumstances." *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 99.

We submit that these principles compel the conclusion that the Government's evidence showed far more than "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*Bausch & Lomb*, p. 721). As set forth in the statement (*supra*, pp. 6–11), the record shows that, several weeks after PD had cut off its retailers for cut rate selling and advertising, and induced its wholesalers to boy-

cott them, it approached the retailers, stated that it would resume selling to them if they "went along" with the suggestion that they stop discount advertising,[14] and informed them that the others were going along with the proposal. The retailers' subsequent cessation of such advertising, and PD's resumption of direct selling to them, clearly shows a tacit understanding by the retailers with PD that, in return for getting PD products again, they would stop discount advertising. Indeed, two of the retailers testified that they "agreed" with PD to do so. Tr. 36, 53, 120. Furthermore, the actions of the wholesalers, taken with knowledge that the others also were doing it, in boycotting the retailers at PD's insistence, then resuming sales to them when PD gave the green light, similarly shows an implicit agreement between the wholesalers and PD not to sell to the retailers as long as PD did not wish it.

In short, PD did not "merely indicate * * * [its] wishes concerning prices and dealing * * * further dealings with all who fail to observe them" (*A. Schrader's Son, Inc., supra*, p. 99). On the contrary, the effect of the implementation of PD's policy of enforcing its "fair trade" prices in non-"fair trade" areas was that price "competition among retail distributors is practically suppressed; for all who would

[14] As indicated (*supra*, p. 81), there is a conflict in the testimony as to whether the suggestion that the retailers stop such advertising emanated from them or from PD. But the source of the suggestion is immaterial; the crucial fact is that the suggestion was accepted, the retailers stopped advertising, and PD then resumed selling to them and authorized the wholesalers also to do so.

deal in the company's products are constrained to sell at the suggested prices. * * * [W]holesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated * * *" (*Beech-Nut* case, *supra*, p. 455). The evidence thus shows "suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers * * *. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it * * *." *Ibid.* "As in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers [and retailers] in [PD's] * * * published resale price list." *Bausch & Lomb*, *supra*, p. 723.

The effect of the decision below is to permit a manufacturer, by cutting off all sales to retail price cutters (directly and through wholesalers) as long as they sell below its suggested resale prices, to enforce "fair trade" in non-"fair trade" areas. But "[a] distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings [and McGuire] Act[s]." *Bausch & Lomb*, *supra*, p. 721. A system such as PD's is particularly effective in eliminating price competition in the drug field where retailers, in order to retain customers, may be compelled to stock the products of a particular manufacturer.

Price competition also is suppressed by eliminating discount advertising. See note 11, *supra*. "Modern competition for business finds advertising one of the most usual and useful of weapons." *Franklin National Bank* v. *New York*, 347 U. S. 373, 377. In view of the increasingly large numbers of states, the "fair trade" statutes of which have been invalidated,[15] these systems could become a widespread method for enforcing illegal resale price maintenance. The legality of such a system under the Sherman Act plainly presents a substantial question.[16]

2. The court below also erred, we believe, in holding, as an alternative ground for dismissing the complaint, that there is "no reasonable probability" that PD would resume its attempts to fix retail prices. While a court of equity has "broad" discretion to determine whether "relief is needed," there must be a "reasonable basis for the District Judge's decision" that relief is unnecessary. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633, 634. We submit that there is "no reasonable basis" (*Grant* case, *supra*, p. 634) for the district court's ruling that there is no need for injunctive relief in this case.

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[15] As of June 26, 1958, 16 of the 45 state non-signer "fair trade" laws had been held unconstitutional, and one had been held unenforceable. Three states had no "fair trade" laws. CCH Trade Reg. Rep. ¶¶ 3003, 3085.

[16] If probable jurisdiction is noted, we reserve the right to argue that PD's arrangements with its wholesalers under which the latter sell at the resale prices fixed by PD are illegal on an additional ground: that since PD and its wholesalers compete in selling to retailers (Tr. 163, 174, 177, 211, 317, 366), they cannot "fix resale prices". Cf. *United States* v. *McKesson & Robbins*, 351 U. S. 305, 313.

Unlike *Grant*, where the defendants "disclaimed any intention to revive" the challenged interlocking directorates which had been terminated (p. 633), there is here no affirmative disclaimer by PD of intention to resume its attempts at resale price maintenance. Similarly, there is nothing in the record to support the district court's conclusions that "in the fall of 1956, [PD] abandoned in good faith its efforts to maintain minimum resale prices in the involved territory"; that "the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field"; and that, "under the long-continuing competitive conditions, neither defendant nor other manufacturer or distributor of like goods could possibly attempt to do so" other than with "heavy financial loss" (*infra*, pp. 24–25). The only evidence in the record showing the reasons for abandonment (whether in "good faith" or not, whatever that may mean) of PD's attempts to enforce "fair trade" prices is the testimony of PD's assistant general attorney that "one of the reasons" therefor was the Government's antitrust investigation (Tr. 229, 232). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit * * *." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333. The only evidence in the record relating to "business and economic conditions in its field" is the testimony that since the year 1955 Parke Davis' "sales volume has gone up generally" (Tr. 403). The statement by a PD official that the price situation in the District had "blown up again" in

November 1956 when cut price advertising was resumed (GX 21; Tr. 384), and the fact that thereafter the retailers were able to obtain PD products despite their cut rate advertising and selling (Tr. 66–67, 116–117, 138, 206–207), do not support the court's rulings on this issue.

Although the district court found that "[t]here is no proof or indication of any intention on the part of Parke, Davis to resume" its "efforts" to "compel the cessation" of retail price cutting in the District and Virginia (Fdg. 27), the Government was not required to introduce such proof. On the contrary, it is for "the defendant" to "demonstrate that 'there is no reasonable expectation that the wrong will be repeated,' " and that "burden is a heavy one." *Grant* case, *supra*, p. 633. We submit that the defendant has completely failed to sustain its burden of making such a showing.

Since the *Grant* decision, there appears to be an increasing trend by defendants in Government civil antitrust cases of abandoning the challenged practices either shortly before or at the time of suit and then urging that, because of such abandonment and the unlikelihood of resumption, injunctive relief is unnecessary.[17] While the argument has been accepted in a number of cases, in all of them there was strong

[17] For example, see *United States* v. *Chicago Mortgage Bankers Assn.*, 123 F. Supp. 251 (N. D. Ill); *United States* v. *L. D. Caulk Co.*, 114 F. Supp. 939 (D. Del.); *United States* v. *The Cincinnati Fruit and Produce Credit Assn.*, Civil No. 2426 (S. D. Ohio) January 18, 1956; *United States* v. *Morgan Construction Co.*, Civil No. 52–914–M (D. Mass.), June 10, 1955, in addition to the cases listed in note 18, *infra*.

evidence showing no need for relief.[18] Here, however, we submit that there is no basis in the record for the district court's holding that there is "no reasonable probability" that PD would resume its attempts to maintain "fair trade" prices in non-"fair trade" areas, and that the court accordingly abused its discretion in so holding.

The question whether an antitrust defendant may avoid issuance of an injunction, designed to protect the public from repetition of illegal anticompetitive practices, by the simple expedient of stopping such practices upon learning of the Government's investigation, without even undertaking not to resume them and without introducing any evidence bearing on that issue, plainly presents a substantial question in the enforcement of the antitrust laws.

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[18] Thus, in *United States* v. *National City Lines*, 134 F. Supp. 350, 361 (N. D. Ill.), all the defendants had "introduced evidence that they have no intention" of repeating the violation, and the Government "offered" "[n]o evidence" "to rebut or to contradict this testimony." In *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684, 690–691 (N. D. Ohio), the reorganization of the Board resulted in the elimination of three of its rules which the Government had challenged as unreasonable restraints of trade, the Board stated that it had no intention "to reenact or enforce" the three rules, and the Board's former president gave sworn testimony to that effect. In *United States* v. *Logan Co.*, 147 F. Supp. 330, 334 (W. D. Pa.), the price-fixing conspiracy related to a patented article. Since the patent had expired, and it "affirmatively appears that the alleged illegal license agreements could survive no longer than the patent, there remains no subject matter upon which the conspiracy charged against defendants could operate."

CONCLUSION

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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DECEMBER 1958.

APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

(Filed July 16, 1958, Harry M. Hull, Clerk)

OPINION

This is a proceeding instituted by the United States under Section 4 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, and entitled "An Act to protect trade and commerce against unlawful restraint and monopolies", commonly known as the Sherman Act. It was brought in order to prevent alleged violations by the defendant, Parke, Davis & Company, of Sections 1 and 3 of the Act (15 U. S. C., Sections 1 and 3).

In the Complaint it is stated that the defendant, one of the nation's principal manufacturers and distributors of pharmaceutical products, engaged, with various co-conspirators, distributors of defendant's products, in an unlawful combination and conspiracy to establish, maintain, enhance and fix both wholesale and retail prices on defendant's products in interstate commerce throughout the District of Columbia and the State of Virginia in violation of the hereinabovenamed sections of the Act. The alleged co-conspirators were not named as defendants.

Plaintiff prayed that defendant be decreed to have combined and conspired as alleged; that it and all

claiming to act in its behalf be perpetually enjoined from carrying out the alleged conspiracy in all respects; and that defendant be enjoined from boycotting, or attempting to boycott, any person, firm or corporation selling or advertising for sale defendant's products below its suggested resale price. Issue was duly joined by Answer of defendant.

At the conclusion of plaintiff's case, counsel for defendant moved under Rule 41 (b) of the Federal Rules of Civil Procedure to dismiss the Complaint; the Court having considered the briefs of the parties, reviewed the transcript, heard oral arguments, and having concluded, upon the facts and the law, that the plaintiff had shown no right to relief, granted the motion, and judgment was ordered accordingly.

It is apparent to the Court, from the testimony and exhibits, that defendant had well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell. It appears that defendant sold its products in the above-mentioned territory directly to retailers through its Baltimore branch in quantity lots at prices less than the retailers could buy from the wholesalers—the latter sold to the retailers primarily in smaller quantities.

It further appears that the sale of defendant's products as compared with the overall sales of like or similar products of other pharmaceutical concerns is very small, but that there is keen competition between its products and those of other producers. Fair Trade laws were not in effect either in the State of Virginia or in the District of Columbia during the pertinent period.

The entire record reveals that representatives of defendant notified retailers concerning the policy

under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy. Defendant's representatives likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant. It may be noted that every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others.

The evidence is clear that both wholesalers and retailers valued defendant's business so highly that they acceded to its policy.

It is apparent from what has been said herein that there was no coercion by defendant and no agreement with co-conspirators as alleged in the Complaint. Clearly, the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U. S. v. Colgate & Company*, 250 U. S. 300. That doctrine continues to be the law.

Counsel for the plaintiff contends vigorously that proof of its allegations is implicit in (1) defendant's calling the attention of both retailers and wholesalers to its policy, and (2) the distributors' acquiescence to the policy. The Court cannot agree to such a nebulous deduction from the record before it.

It was shown that defendant, in the fall of 1956, abandoned in good faith its efforts to maintain minimum resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products in the State of Virginia or the District of Columbia. It is clear that, under the long-continuing competitive conditions, neither de-

fendant nor other manufacturer or distributor of like goods could possibly attempt to do so. If they did, there could be no result other than heavy financial loss.

It is true that the General Counsel of defendant testified that the abandonment of the required sales prices was in some measure concerned with defendant's having learned that the Anti-Trust Division of the Department of Justice was looking into its business, but he stated positively, in effect, that it was not the chief or moving factor in its action of abandonment. It is evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field.

There can be no doubt from what has been stated herein that, even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from doing as alleged when there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated, would be an empty gesture. *U. S.* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466 (1916).

In view of the Court's opinion as hereinbefore set forth, there follows its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant, Parke, Davis & Company (hereinafter referred to as Parke, Davis) is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at Detroit, Michigan. It transacts business and is found within the District of Columbia. It maintains a branch office at Baltimore, Maryland, to which pharmaceutical products are sent in interstate commerce

from its principal plant in Michigan. These products are then distributed in interstate commerce from its Baltimore office to various drug wholesalers and retailers, including drug wholesalers and retailers in the District of Columbia and the State of Virginia. The Baltimore branch office operates in accordance with policies laid down by the Company's home office in Detroit.

2. Parke, Davis manufactures approximately 600 different pharmaceutical products, including both prescription and nonprescription items. In 1956, the total dollar volume of its sales in the District of Columbia and Richmond, Virginia, was as follows:

	To Retailers	*To Wholesalers*
District of Columbia	$199,304	$161,247
Richmond, Virginia	58,870	113,651

3. Parke, Davis' sales constitute less than 5% of the sales of pharmaceutical products in the District of Columbia and Richmond, Virginia. There are about 2,000 different drug manufacturers selling about 178,000 different drug items in the District of Columbia.

4. Plaintiff makes no claim that the prices for Parke, Davis products are not competitive with similar products produced by other pharmaceutical manufacturers. Parke, Davis' products are sold in the District of Columbia and the State of Virginia in intense competition with the products of other manufacturers.

5. Retailers may buy Parke, Davis products either directly from Parke, Davis or from wholesalers. Ordinarily, their large volume purchases are made from Parke, Davis which offers a lower quantity price on some of its products than the wholesalers offer. The wholesalers, on the other hand, provide the retailers the convenience of smaller quantity purchases, day-to-

day service, and a wide variety of products of many different manufacturers.

6. During the period covered by the Complaint, there were no Fair Trade laws in effect in either the District of Columbia or the State of Virginia.

7. Suggested minimum resale prices were unilaterally established by Parke, Davis for retailers and wholesalers in the District of Columbia and Virginia and elsewhere, and were published to the trade long before the summer of 1956.

8. The Parke, Davis catalogue for retailers contained the following statement under the heading "Minimum Retail Pricing Applying to Parke, Davis Products"

> "The Minimum Retail Prices herein set forth or in the Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those States which have not enacted Fair Trade Laws."

9. The Parke, Davis catalogue for wholesalers contained the following statement under the heading "Wholesale Drug Trade Sales and Distribution Policy"

> "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe the Net Price Selling Schedule in this Parke, Davis & Company Wholesale Drug Trade Biller's Price List and Supplements, and who confine their distribution of Parke, Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions."

10. Parke, Davis did not have any regularized or systematic machinery for maintaining its suggested

minimum prices as to either retailers or wholesalers. It did not regularly "shop" stores, maintain card index files, or in any other manner police its suggested minimum prices in either the District of Columbia or Virginia, nor is there any evidence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested minimum prices.

Parke, Davis learned of the price cutting through its salesmen who called at those retail stores which ordered directly from Parke, Davis; the salesmen reporting the cut prices and advertising thereof, due to the complaints of such retailers.

11. In the spring of 1956, Parke, Davis also had a policy of refusing to sell to retailers it deemed to be undesirable customers, including those whose failure to maintain suggested minimum retail prices disrupted the market, and of refusing to sell to wholesalers who sold to retailers who were considered undesirable.

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit. This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws. At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company. Upon the

basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia, and upon his return he instructed his assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer. Parke, Davis did not seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences. These instructions were carried out in July, 1956.

13. When five retailers continued, despite the announcement of Parke, Davis' intentions, to sell Parke, Davis products below the suggested minimum retail prices, Parke, Davis discontinued selling to them and told wholesalers in the District of Columbia and Virginia that it would discontinue selling to them also if they sold Parke, Davis products to those retailers.

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices. Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves, although occasionally such products were sold by inadvertence to those retailers. There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject.

15. The retailers who were cut off by Parke, Davis because they failed to observe Parke, Davis' suggested

minimum retail prices continued nonetheless to advertise such products at cut prices by window displays or newspaper advertisements for the reason that they still had such products in their inventory.

16. Advertising of price cuts by a few retailers in the District of Columbia was, so far as Parke, Davis products were concerned, confined to a few products, mostly certain popular vitamins. In some cases, the prices quoted in the advertisements were below the price at which a small retailer could purchase the same product from Parke, Davis or one of its wholesalers. These advertisements injured the good name and marketability of Parke, Davis' products generally and resulted in Parke, Davis losing the support and confidence of the great majority of the retailers upon whom it relied for the promotion of its goods. The principal cut-price advertiser, Dart Drug, encouraged customers responding to its advertisements to purchase its own private brand of vitamins, and the proprietor of that concern acknowledged that on occasion its salesmen had switched customers requesting Parke, Davis products to such Dart private brands. This was one of the purposes of cut-price advertising.

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows. Parke, Davis then resumed selling its products to each of these retailers, and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no

newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices. Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers.

18. Although advertisements featuring Parke, Davis products at cut prices commenced to appear again in newspapers in the District of Columbia at the end of September 1956, and although the retailers which had ceased such advertising thereafter resumed it, Parke, Davis took no further action with regard to retail prices or advertising, and it continued to sell to all retailers concerned.

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples. Parke, Davis did not solicit any agreement, and Peoples did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.

20. No witness was called connected with Babbitt. There is no evidence that Parke, Davis solicited any agreement, or that Babbitt entered into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. However, sales to Babbitt were curtailed for a period of time and later resumed.

21. Standard Drug was advised of Parke, Davis' policy and informed that if it continued to cut prices on Parke, Davis products it would be cut off. It made no commitment of any kind to Parke, Davis, it continued to cut prices, and it was cut off for about two weeks. Parke, Davis did not solicit any agree-

ment, and Standard Drug did not enter into any agreement or understanding of any kind with Parke, Davis concerning either prices or advertising.

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in cooperative advertising and purchasing. From time to time, Drug Mart advertised cut prices on Parke, Davis products. Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued, and Drug Mart in fact discontinued such advertising for a period of several months. There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount. Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. The evidence shows that each member store of the organization was free to charge whatever prices it wished and to advertise as it wished, regardless of whether there was any joint advertising of Parke, Davis products.

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell

to it. Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis. When it again advertised Parke, Davis refused to sell. Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter. At all times, Dart Drug sold Parke, Davis' products at cut prices in its store, whether or not it was advertising them. Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them.

24. State Drug and McReynolds Drug were among the retailers who were cut off by Parke, Davis when they continued to sell Parke, Davis products at cut prices after Parke, Davis' policy had been announced to them. Neither concern individually advertised cut prices in the newspapers, though they did through Drug Mart, an association of independent retailers. While neither one was alleged to have conspired individually with Parke, Davis as to pricing, advertising or any other matter, the Drug Mart group, of which State and McReynolds were members, was alleged to have conspired with Parke, Davis as to pricing and advertising.

25. No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis & Company products.

26. On December 12, 1957, subsequent to the trial of the companion criminal action, Parke, Davis informed Dart Drug Company that it was permanently closing the Dart account and did not intend to have

any further dealings with that company. Since that time, Parke, Davis has not sold its products to Dart Drug. There is no evidence, however, that Parke, Davis made any effort to influence the dealings of Dart Drug with the wholesalers, and Dart Drug has continued to purchase Parke, Davis' products from wholesalers in the District of Columbia and to sell and advertise such products at cut prices. Parke, Davis' action in ceasing relations with Dart was a purely unilateral one, and there is no evidence that it had any relation to Dart's prices or advertising policies.

27. In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell. Since the fall of 1956, and up until the present time, retailers in both areas, including retailers alleged to be co-conspirators, have continuously sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and/or Parke, Davis itself. Parke, Davis has made no efforts to compel the cessation of these practices. There is no proof or indication of any intention on the part of Parke, Davis to resume such efforts. There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia.

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis. The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.

29. The evidence shows that in early 1956 Washington Wholesale Drug Exchange, a co-operative, adjusted its practices in billing its customers on Parke, Davis goods so as not to credit any of its accounts with a cash discount on the face of the invoice, when Parke, Davis pointed out that it was crediting for a cash discount without proof that cash had in fact been paid. Its billing practices were inconsistent with the suggested minimum resale price policy of Parke, Davis, which took no action to prevent the granting of cash discounts whenever they had in fact been earned. Under the modified billing procedures, cash discounts were still granted in a different form. The evidence shows that in making this change in its billing practices, Washington Wholesale was merely conforming to Parke, Davis' minimum resale price policy, and did not make any agreement as to price.

30. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to sell pharmaceutical products only to retailers licensed to fill or dispense prescriptions. The evidence shows that

the wholesalers were familiar with Parke, Davis' policy in this respect as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 refused to sell Parke, Davis' products to non-drug outlets because they each separately recognized that if they did not adhere to this policy, Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to sales to non-drug outlets, or that Parke, Davis ever solicited an agreemnet from any of them as to this matter.

31. There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more than one wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer.

CONCLUSIONS OF LAW

1. The evidence as a whole does not support the allegations of paragraphs 13 through 16 of the Complaint.

2. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that on sales of pharmaceutical products manufactured by defendant Parke, Davis the wholesaler co-conspirators and retailer co-conspirators would adhere to resale prices fixed by defendant Parke, Davis.

3. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or

anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant and the wholesaler co-conspirators would refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who did not agree to adhere to resale prices fixed by defendant Parke, Davis.

4. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the retailer co-conspirators would not advertise pharmaceutical products manufactured by defendant Parke, Davis at prices lower than the resale prices fixed by defendant Parke, Davis.

5. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant and the wholesaler co-conspirators would refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who advertised such products at prices lower than the resale prices fixed by defendant Parke, Davis.

6. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant would induce, coerce and compel wholesalers not to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who sold or advertised such products at prices lower than the resale prices fixed by defendant Parke, Davis.

7. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone also involving the District of Columbia or the State of Virginia to the effect that defendant Parke, Davis and the wholesaler co-conspirators would sell pharmaceutical products manufactured by defendant Parke, Davis only to retailers licensed to fill or dispense prescriptions.

8. No violation of Section 1 of the Sherman Act has been shown.

9. No violation of Section 3 of the Sherman Act has been shown.

10. In view of defendant's changed practices and the other facts found by this Court in connection therewith, the awarding of injunctive relief would be neither necessary nor appropriate, even had the defendant, contrary to this Court's findings, been found to have engaged in unlawful price activities.

11. Plaintiff has shown no right to relief upon the facts and law, and defendant's timely motion for dismissal, under Rule 41 (b) is granted, and judgment in favor of the defendant shall be entered in accordance with these findings of fact and conclusions of law.

JOSEPH R. JACKSON,
*United States District Judge by Designation**

JULY 16, 1958

*A Senior Judge of the United States Court of Customs and Patent Appeals, sitting by designation pursuant to the provisions of § 294 (d) of Title 28, United States Code.

APPENDIX B

United States District Court for the District of Columbia

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

ORDER

Defendant having moved under Rule 41 (b) of the Federal Rules of Civil Procedure to dismiss the Complaint at the conclusion of the Plaintiff's case, and the Court having considered the briefs of the parties, reviewed the transcript, heard oral argument, and having concluded that, upon the facts and the law, the Plaintiff has shown no right to relief,

IT IS ORDERED that judgment be entered for Defendant and that the Complaint be and is hereby dismissed in accordance with the Opinion and Findings of Fact and Conclusions of Law filed herewith.

/s/ JOSEPH R. JACKSON,
Joseph R. Jackson,
United States District Judge by Designation.

JULY 16, 1958

No. 4957

Office Supreme Court, U.S.
FILED
JAN 10 1950
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA, *Appellant*,

v.

PAIGE, DAVIS & COMPANY, *Appellee*.

MOTION TO AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 567

UNITED STATES OF AMERICA, *Appellant*,

v.

PARKE, DAVIS & COMPANY, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16, para. 1(c), of the Revised Rules of this Court, appellee moves that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so unsubstantial as not to warrant further argument.

INTRODUCTION

This is a conspiracy case under Sections 1 and 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 3. The crucial issue is whether or not in fact a conspiracy or other agreement was entered into by appellee Parke, Davis & Company (hereinafter Parke, Davis). The District Court, after hearing and evaluating the testimony of some 17 witnesses called by the Government, found that the Government had failed to

prove a conspiracy, and accordingly dismissed the complaint.

The basic question presented by this appeal is whether or not the District Court's evaluation of the extensive oral testimony, and his resulting findings of fact, were "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure. In spite of appellant's effort in its Jurisdictional Statement to clothe this issue in more attractive raiment, this is all that is involved; no substantial question of law is presented, nor is any problem of general importance, in the administration of the antitrust laws or otherwise. A brief consideration of the evidence before the District Court will show that even this narrow factual question is unsubstantial. Furthermore, the entire controversy is of no importance, as is shown by the District Court's additional conclusion that in any event the case is moot. Accordingly, this motion to affirm should be granted.

STATEMENT

The case involves the refusal of Parke, Davis, during a brief period in 1956, to make its products available to a few retailers in the cities of Washington, D. C. and Richmond, Virginia, whose resale price and advertising policies jeopardized its good will and business relationships with its other customers. This short-lived and largely ineffective attempt to protect its business interests was charged in the complaint and a companion indictment to have constituted a conspiracy.[1] The criminal case was tried in the United

[1] Specifically, Parke, Davis was charged with entering into a combination and conspiracy with five named retailers and five named wholesalers. (Complaint, paras. 5, 6, 13; Plaintiff's Answers to

States District Court for the District of Columbia in October and November, 1957, and ended in an acquittal granted by the trial judge at the close of the Government's evidence.[2] Thereafter, in June, 1958, the companion civil proceeding, which is the subject of the present appeal, came on for trial before a different judge of the same court. Fourteen Government witnesses, and three Parke, Davis representatives called as witnesses by the Government, testified. At the close of the Government's evidence, the court granted Parke, Davis' motion under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the complaint on the ground that upon the facts and the law the Government had failed to show any right to relief.

The heart of the District Court's decision, supported by specific findings of fact, was the determination that the evidence did not show conspiracy or agreement as alleged in the complaint, but merely lawful unilateral

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Defendant's Interrogatories 1, 2, February 19, 1958). The alleged combination and conspiracy consisted of an "agreement, understanding and concert of action" dealing with four different subjects: the prices at which the retailers would sell Parke, Davis products; the prices at which the retailers would advertise Parke, Davis products; the prices at which the wholesalers would sell Parke, Davis products; and the kinds of retail outlets to which the wholesalers would sell Parke, Davis products. (Complaint, para. 14; Plaintiff's Answers to Defendant's Interrogatories 4(a), 4(c), February 19, 1958).

The statements of questions presented in the Notice of Appeal and the Jurisdictional Statement do not include the latter two aspects of the alleged conspiracy (wholesalers' prices, and the kinds of retail outlets to which wholesalers were to sell); the Government's claims on these points, therefore, are not before this Court. See Rule 15, para. 1(c), of the Revised Rules of this Court.

[2] The opinion of the trial court (Judge Tamm) is set out in full at 1957 CCH Trade Cases, para. 68,856.

action on the part of Parke, Davis, under the established rule of *United States* v. *Colgate & Co.*, 250 U.S. 300, and related cases.[3] This holding, the subject of the first of the two questions raised by appellant here, is the principal matter presented to this Court.[4]

The phrasing of the first question in appellant's Jurisdictional Statement—and, indeed, its treatment throughout the Jurisdictional Statement—obscures the real nature of the challenge to the District Court's decision. Appellant does not raise any serious question as to the trial judge's understanding or application of the law to the facts as he found them; rather, it challenges his assessment of the evidence presented before him.

[3] In the criminal case, Parke, Davis' motion under Rule 29(a) of the Federal Rules of Criminal Procedure for an acquittal at the close of the Government's evidence was similarly granted upon the ground that the evidence failed to show conspiracy or agreement. The Government's evidence in that proceeding was substantially the same as in this.

[4] The second question presented in the Jurisdictional Statement challenges the District Court's further finding that Parke, Davis had in good faith abandoned the practices challenged by the complaint long before the trial, and his conclusion that even if a conspiracy had been proven there would be no ground for equity to intervene. While appellee considers this ruling of the District Court entirely correct and a sufficient ground for disposing of the case, it does not propose to discuss the question on this motion. For the appeal on this point presupposes error on the first point: only if a violation was in fact shown does the issue of the necessity for relief arise. Since, as will be shown, the District Court was fully justified in finding as a fact that no conspiracy had been proved, there is no need to reach the merits of the mootness question. The District Court's determination that in any event the case is moot does, however, further emphasize the unimportance of the whole controversy.

Although nowhere in the Jurisdictional Statement is this made clear, appellant is asking this Court in effect to examine all the testimony and exhibits presented to the court below, to overturn the explicit findings of the trial court, and to hold that the evidence shows conspiratorial rather than unilateral action.

This effort to obtain a trial *de novo* of the evidence does not present a substantial question warranting plenary consideration here. The unchallenged findings of the District Court, together with consideration of the evidence supporting the findings which are challenged, show no substantial error and demonstrate that no conspiracy or agreement was proved. This analysis will also show that the law was properly applied by the trial judge to the facts he found.

The Undisputed Facts As Found By The District Court[3]

Parke, Davis is a manufacturer of pharmaceutical products. It competes with some 2,000 other manufacturers of such products (Fdg 3; Tr. 173), none of which is involved in this case, and its sales account for less than 5 per cent of the total sales of pharmaceutical

[3] The facts recited here are those embodied in findings of fact and supporting evidence are not challenged by appellant in the Jurisdictional Statement. Appellant contends, in footnote 3 of the Statement, that its recital of the facts is based upon evidence that is "substantially uncontradicted." However, as will appear in the succeeding section of this motion, much of such evidence is in fact either contradicted or of doubtful weight. It may also be noted that most of appellant's version of the facts was submitted to the District Court in the form of proposed findings of fact and proposed amendments to the court's findings of fact; all of which were rejected by that court.

products in the District of Columbia and in Richmond, Virginia (Fdg 3; Tr. 396).[6] Competition in the business is intense (Fdg 4; Tr. 400, 402-03), and there has been no claim in this case that the prices of Parke, Davis' 600-odd products are not competitive with the prices of the other 168,000 products in the field (Fdg 4; Plaintiff's Answer to Defendant's Interrogatory 6(1)(a), January 2, 1958).[7]

Parke, Davis sells its products to retail drugstores both directly and indirectly, through wholesalers; the retailers in turn resell the products to members of the consuming public (Fdgs 5, 1; Complaint and Answer, para. 8, Tr. 27). Parke, Davis not only unilaterally sets the prices at which it sells its products, but in addition unilaterally establishes suggested prices at which the products should be resold by retailers to the public (Fdgs 7-9; Pl. Ex. 1, Tr. 24). Such retail resale prices are enforced by fair trade agreements in states that have fair trade laws, and are suggested for use in states that do not (Fdg 8; Pl. Ex. 1, Tr. 24). In the spring of 1956, Parke, Davis had a policy of refusing to sell to retailers in non fair trade areas who did not observe its recommended resale prices, and of refusing to sell to wholesalers who sold to such retailers (Fdg 11; Tr. 222-23, 315-F, 338-39, 361-62). Parke, Davis had, however, no regularized or systematic machinery for enforcing its policy as to suggested resale prices; it did

[6] By a stipulation at the pretrial proceedings, the Government narrowed its charge regarding Virginia to claim that the alleged conspiracy had effect only in the city of Richmond, rather than in the entire state. (Pretrial Proceedings, April 2, 1958.)

[7] There has been vigorous retail price-cutting and cut-price advertising on other manufacturers' products at all pertinent times in the District of Columbia. (Pl. Ex. 2, 3, Tr. 57-60, Pl. Ex. 7, Tr. 110-11, Pl. Ex. 8, 9, Tr. 112-13; Tr. 315-J, 315-K, 352-53, 402-03.)

not, for instance, regularly shop stores or maintain card index files of offenders; and there is no evidence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested prices (Fdg 10; Tr. 343).

In 1956, neither the District of Columbia nor the State of Virginia had a fair trade law in effect (Fdg 6; Tr. 322).[2] Before the summer of that year, however, Parke, Davis' policy regarding suggested retail prices was not being applied in the District of Columbia or in Richmond, Virginia. Although there was some price cutting on Parke, Davis products (Fdg 12; Tr. 315-11, 364), it was not sufficiently prevalent to cause concern to the Parke, Davis branch manager in Baltimore who was responsible for this area (Fdg 12; Tr. 315-1, 315-J). Having recently been transferred into the area from a region where fair trade laws were in effect, the branch manager was in fact not even aware that Parke, Davis had a policy of attempting to obtain observance of its resale prices in non-fair trade areas by refusals to sell (Fdg 12; Tr. 360, 365, 409). In the spring of 1956, however, advertising of deep price cuts on Parke, Davis products by a retailer in the District of Columbia, Dart Drug Company, had become a matter of concern (Fdg 12; Tr. 315-J). The prices Dart Drug offered on some products of Parke, Davis principally certain vitamins were below those at which small retailers could purchase the same products (Fdg 16; Tr. 85). One of the purposes of such advertising was to attract customers who, though they requested Parke, Davis' products, might be induced to buy other, more profitable brands instead (Fdg 16; Tr. 89-91, 340-41). Such ad

[2] Virginia has since reinstituted such a law. See Va. Code §§ 59-84 to 59-89 (1958 Supp.).

vertising injured the good name and marketability of Parke, Davis' products and resulted in Parke, Davis losing the confidence of a great many of the retailers upon whom it relied for the promotion of its goods (Fdg 16; Tr. 340-42, 398-400).

Parke, Davis' branch manager, therefore, sought guidance at a sales meeting at Parke, Davis' headquarters in Detroit, where he was informed of the company's policy of refusing to sell to price cutters in non-fair trade areas (Fdg 12; Tr. 363-66). He thereupon put that policy into effect by instructing his assistants and Parke, Davis' salesmen to inform the trade in the District of Columbia and Virginia that it was Parke, Davis', policy not to sell to any retailer who resold Parke, Davis products below the suggested prices, and not to sell to any wholesaler who in turn sold those products to such a retailer (Fdg 12; Tr. 367). Parke, Davis' representatives were neither instructed nor authorized to seek agreements on this subject from either retailers or wholesalers, but were merely instructed to state the policy regarding retail prices and its consequences (Fdg 12; Tr. 397-98).[7] Pursuant to these instructions, Parke, Davis' salesmen and field managers did, in July, 1956,

[7] The following testimony by Parke, Davis' branch manager is uncontradicted:

> Q. When you talked to your salesmen, you were asked about your discussion with Mr. Cummings and Mr. Powers, did you authorize any of them to go out and make agreements with any of your customers about prices?
>
> A. No, we didn't seek agreements at any time, nor did I ask our men to seek agreements. I told them to state the policy and the consequences.
>
> Q. The policy was that the wholesalers could not sell to price-cutting retailers?

announce the policy to both retailers and wholesalers in the District of Columbia and in Richmond (Fdg 12; Tr. 368-69, 402).

Upon being informed of Parke, Davis' policy, one retailer organization, the Drug Mart group—a cooperative buying and advertising organization of some 30 independent retailers—ceased its occasional joint advertising of cut prices on Parke, Davis products, although the member stores were entirely free to sell those products, or even advertise them individually, at whatever prices they wished (Fdg 22; Tr. 108-09, 120-22, 186-88). Likewise upon being informed of Parke, Davis' policy, a representative of one other retailer, Peoples, stated that he would cease cutting prices on Parke, Davis products (Fdg 19; Tr. 320-21, 346).

Despite the announcement of Parke, Davis' policy, however, five other retailers, Dart Drug, Standard Drug, Babbitt, State Drug and McReynolds Drug, continued to sell Parke, Davis products at cut prices (Fdgs 23, 21, 20, 24; Tr. 367-69). Parke, Davis thereupon ceased to sell its products to those five retailers, and in addition brought their names to the attention of five wholesalers serving the District of Columbia and

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"A. That's correct.

"Q. Or they would be cut off?

"A. That's correct.

* * * *

"Q. And you would not sell to any retailer who sold below your suggested minimum prices?

"A. That's correct.

"Q. And you authorized no one to enter into an agreement?

"A. I wouldn't have the power to authorize anyone to make such an agreement.

"Q. Did you give them any such authorization?

"A. No." (Tr. 397)

Virginia (Fdgs 13, 14; Tr. 168, 203, 213, 296, 316). Three of these wholesalers, as a result of Parke, Davis' policy, attempted to stop their sales of Parke, Davis products to those retailers, although some such sales continued to occur (Fdg 14; Tr. 152-54, 169, 214, 304-06). Despite these refusals to sell, however, the retailers concerned continued to offer Parke, Davis products for sale at cut prices (Fdg 15; Tr. 81-83, 100-02, 116, 133; Pl. Ex. 2, 3, Tr. 57-60).

After about six weeks of this unsuccessful attempt to make effective the policy with regard to suggested retail prices, Parke, Davis' branch manager changed his approach. At the end of August, 1956, he informed some of the five retailers that Parke, Davis would sell to them regardless of the prices at which they resold its products, but would refuse to supply them if they advertised cut prices on such products in the newspapers or by window signs (Fdg 17; Tr. 70-71, 115, 123-25, 197-98, 330-34, 374-77, 379-80). Thereafter, one of the retailers, Dart Drug, ceased its newspaper advertising of cut prices on Parke, Davis products (Fdg 21; Tr. 55-56); and two others, State Drug and M. Reynolds Drug, took down their window signs (Tr. 116, 135). It does not appear that the other retailers, Standard Drug and Babbitt, took any action at all. (Fdgs 20, 21). Parke, Davis then resumed selling its products to all five retailers (Fdg 17; Tr. 116, 198, 335-36).

For a period of a month thereafter, there was no cut price advertising on Parke, Davis products in the District of Columbia, at least in the newspapers (Fdg 17; Pl. Ex. 10, Tr. 114; Tr. 71-73); the price-cutting retailers, however, continued to sell the Parke, Davis products at cut prices (Fdg 17; Tr. 70, 117, 135, 207). And, as the District Court found,

> "No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis and Company products." (Fdg 25).

Furthermore, the prices at which retailers resold Parke, Davis products at no time had any effect on the prices Parke, Davis itself received for those products (Tr. 398).

In November, 1956, vigorous cut-price advertising on Parke, Davis products broke out again (Tr. 56, 68-69), and it has continued ever since (Fdg 27; Tr. 68-69, 117, 138, 206-08). Parke, Davis, however, made no further effort to discourage price cutting or cut-price advertising on its products (Fdg 18; Tr. 57, 66, 116-17, 138); in fact, it abandoned any attempt to maintain retail prices in the areas in question, its efforts in this direction through the exercise of its right to choose its customers having proven wholly unsuccessful (Fdg 27; Tr. 229-32).

Appellant's Challenge To The District Court's Findings

None of the above facts found by the District Court appears to be controverted by appellant. The only controversy is as to whether in this history of Parke, Davis' brief and futile attempts to stop price cutting on its products there is proof of conspiracy, combination or agreement, or whether, as the District Court found, the proof shows no more than unilateral action by Parke, Davis.

Appellant's contention that an unlawful conspiracy was proven disputes the findings of the District Court at three points: appellant claims that there was an agreement between Parke, Davis and five retailers named as co-conspirators, obligating the retailers not to cut

prices on Parke, Davis products; that there was an agreement with the same five retailers that they would not advertise cut prices on Parke, Davis products; and that there was an agreement between Parke, Davis and five wholesalers named as co-conspirators that the wholesalers would not sell Parke, Davis products to the price-cutting retailers.[10]

(A) THE ALLEGED RETAILER CONSPIRACY REGARDING PRICES

The five retailers alleged to have agreed with Parke, Davis not to sell its products at cut prices were Dart Drug, Standard Drug, Drug Mart, Babbitt and Peoples (Plaintiff's Answer to Defendant's Interrogatory 2, February 19, 1958). The evidence shows, however, that Dart Drug and Standard Drug at no time agreed to stop cutting prices; in fact, they were cut off by Parke, Davis for the reason that they continued to cut prices on its products (Fdgs 23, 21; Tr. 32, 81, 82-83, 193-96). No witness was called from Babbitt, but the evidence shows that Babbitt was cut off (Fdg 20; Tr. 149-50, 300-01, 369), and it therefore indicates that Babbitt also must have continued to cut.[11] The witness from Drug Mart stated that that group ceased its occasional advertising of cut prices on Parke, Davis products after being informed of Parke, Davis' policy, but he affirmed that the individual stores could continue to sell at cut prices, and even to advertise those prices individually, if they saw fit (Tr. 187-88); this testimony was corroborated by another witness who was a member of that organization (Tr. 120-122), and is uncontradicted

[10] See note 1 *supra*

[11] There is some contradictory testimony by the proprietor of Dart Drug, who stated that around the middle of July Babbitt was not cutting prices on Parke, Davis products (Tr. 83). Other testimony of this witness is discussed at pp. 14-15 *infra*.

ed. As to none of these four supposed co-conspirators, therefore, is there any evidence whatsoever to support the charge of conspiracy with regard to prices.

No witness connected with the remaining retailer, Peoples, was called by the Government; the only direct testimony regarding Parke, Davis' dealings with Peoples was that of a Parke, Davis representative. This witness testified that he had told a vice president of Peoples that Parke, Davis would not sell to Peoples if Peoples cut prices on Parke, Davis products, and that the vice president replied that Peoples would stop cutting prices (Tr. 320-21, 346, 356). He also testified as follows: [12]

> "Q. . . . Did you make any agreement with Mr. Downey [the vice president of Peoples]?
> "A. Never.
> "Q. You simply told him that you would refuse to sell him if he continued to advertise or charge cut prices, right?
> "A. Correct." (Tr. 346)

(B) *THE ALLEGED RETAILER CONSPIRACY REGARDING ADVERTISING*

With regard to the supposed agreement not to advertise cut prices on Parke, Davis products, the same five retailers were alleged to be involved (Plaintiff's An-

[12] Other evidence bearing on Peoples' practices regarding its prices for Parke, Davis products includes the testimony of another witness that he was told by a Parke, Davis salesman that "Peoples was going to stop cutting prices, or had stopped cutting prices" (Tr. 185); testimony that prior to the visit from the Parke, Davis representative at which the Parke, Davis policy was discussed Peoples was cutting prices in only two of its stores (Tr. 34-36, 81, 83); and testimony indicating that Peoples' price cutting had never been very vigorous (Tr. 371).

swer to Defendant's Interrogatory 2, February 19, 1958). The Government's principal witness on this score—and, indeed, the main prop of the Government's case—was the proprietor of Dart Drug. This witness testified that he made not one but two agreements with Parke, Davis on the subject of advertising (Tr. 36-39, 51-53)—in fact, he used the words "agree" or "agreement" 14 times in his testimony (Tr. 32, 36, 38, 42, 53, 54, 71, 72, 77).[13] In spite of this pointed testimony, however, he conceded that both of the "agreements" amounted to no more than this:

> "Q. He [the Parke, Davis representative] simply said that . . . if you did advertise he wouldn't sell to you, and if you didn't he would?
>
> "A. That is right, sir.
>
> "Q. And you said to him that if somebody else advertises I am going to advertise?
>
> "A. That is right, sir." (Tr. 69-71).

The testimony of this witness must, of course, be considered along with such other evidence as the testimony of two Parke, Davis representatives that they had not sought, and did not have authority to seek, any agreement from this or any other retailer, but had merely stated Parke, Davis' policy to him, and left him to decide his own course of action (Tr. 318, 374-77, 379, 380, 397-98). It must, moreover, be weighed in a balance which includes evidence that he was the complaining

[13] In the companion criminal case, this witness testified that he had suggested to a vice president of Parke, Davis that "maybe there was some area of agreement we could have," and that the vice president had replied "nothing doing" (Tr. 74-75). In this case, his testimony was that the same vice president had asked him "if I was ready to agree to their terms" (Tr. 42).

witness who had instigated the investigation leading to this case (Tr. 79, 344); evidence that he had consulted with his lawyer with regard to the possibility of bringing a treble damage action against Parke, Davis on the basis of the subject matter of this suit (Tr. 86) and was attempting, in his dealings with Parke, Davis, to lay a foundation for such a suit (Tr. 30, 33, 35, 40, 42, 74-77); and the fact that his testimony in this case contradicted not only the testimony of other witnesses (compare Tr. 47 with Tr. 305, Tr. 52 with Tr. 345-46) but in addition his own testimony in both this and the companion criminal case (Tr. 71-73; Tr. 42, 74-75). The trial judge, who had all this evidence before him and was in a position to observe and assess the witnesses themselves, concluded that

> "Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them." (Fdg 23).

One other alleged co-conspirator, Drug Mart, also ceased advertising price cuts on Parke, Davis products in response to a declaration of Parke, Davis' policy; although, as in the case of Dart Drug, all the member stores were entirely free to sell Parke, Davis products at cut prices even while the advertising was suspended (Fdgs 22, 23; Tr. 70, 109, 121-22, 187-88), and of course continued to advertise cut prices on other manufacturers' products (Pl. Ex. 2, 3, Tr. 57-60; Pl. Ex. 7, Tr. 110-11). The evidence regarding the reason for Drug Mart's action shows that a Parke, Davis salesman informed the "coordinator" of Drug Mart that Parke, Davis would not sell to any of the member stores if the

organization continued its occasional advertising of cut prices on Parke, Davis products (Tr. 185-86); that the coordinator told the salesman that "I would go along with him" (Tr. 186) and then asked the advice of the president of the organization (Tr. 186) and a committee of its members (Tr. 108-09); and that the committee decided by majority vote to stop the advertising in question in order not to be cut off by Parke, Davis (Tr. 108-09, 120-21).[14] Upon consideration of such evidence as this, the trial judge determined that

> "Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdg 22).

In addition to Dart Drug and Drug Mart, there were two other retailers, McReynolds Drug and State Drug, who responded to Parke, Davis' change in policy by temporarily taking down their window signs advertising cut prices on Parke, Davis products (Tr. 96, 116, 134-35, 332-34, 379-80). Neither of these, however, was even alleged to be a co-conspirator.[15] As to the three other retailers who were alleged to have conspired to

[14] The evidence also indicates that one reason why Drug Mart discontinued the advertising was that Parke, Davis had informed the buyer for Drug Mart, who had been passing along certain premium payments to the members of the organization for use as discounts on Parke, Davis products, that this was an improper use of such premium payments, and the buyer was therefore no longer interested in promoting Parke, Davis products (Fdg 22; Tr. 347-48).

[15] McReynolds Drug and State Drug were among the five retailers who were cut off by Parke, Davis because of their price cutting (Fdg 24; Tr. 102, 131-33) and restored as customers after the change in policy (Tr. 116, 135). Although as indicated they took down their window signs mentioning cut prices on Parke, Davis products in response to the change in policy, both stores at all times actually sold such products at cut prices (Tr. 117, 135).

stop advertising—Babbitt, Standard Drug and Peoples—there is a gaping lack of proof. The only proof of any response by any of them to Parke, Davis' change of approach was the testimony of the same principal complaining witness, Dart Drug's proprietor, that he was told all three were "back in line" on advertising (Tr. 37, 54-55). There was no witness from Babbitt, however, and no evidence of any conversations between Parke, Davis and that organization on the subject of advertising; nor even any evidence that Babbitt in fact did any advertising, let alone ceased to advertise. There was no witness from Peoples, either, and the evidence showed only that Peoples advertised Parke, Davis products once at cut prices and once at the recommended prices during the period in question (Pl. Ex. 8-10, Tr. 112-14), and that it was not unusual for Peoples to advertise at recommended prices (Tr. 385).[16] Finally, as to Standard, the evidence shows that a representative of that organization told a Parke, Davis representative that "we could not agree" to stop cut-price advertising (Tr. 198), that he made no commitment to stop it (Tr. 205, 323), and that Standard in fact advertised cut prices on Parke, Davis products while others were refraining from doing so (Tr. 71). As to each of these retailers, the trial judge found that

> "Parke, Davis did not solicit any agreement and Peoples [Babbitt, Standard Drug] did not enter

[16] The only evidence regarding any communication between Parke, Davis and Peoples on the subject of advertising was the testimony of a Parke, Davis representative, as follows:

> "Q. You simply told him [the vice president of Peoples] that you would refuse to sell him if he continued to advertise or charge cut prices, right?
>
> "A. Correct." (Tr. 346).

into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdgs 19-21).

Taking this proof—almost all of it oral testimony as a whole, and given the opportunity of the trial judge to observe the witnesses, there is ample support for his conclusion that the Government failed to prove the allegations of the complaint, and for his findings as to each of the retailers alleged to be co-conspirators, that there was no conspiracy as to either prices or advertising.

(C) *THE ALLEGED WHOLESALER CONSPIRACY*

With regard to the allegation of a conspiracy between Parke, Davis and the wholesalers not to sell Parke, Davis products to price-cutting retailers, five wholesalers are claimed to have been involved: District Wholesale, Washington Wholesale Drug Exchange, H. B. Gilpin Company, Powers-Taylor, and Murray Wholesale (Complaint, para. 5). The evidence shows that Parke, Davis advised each of these wholesalers of its policy with regard to sales to price-cutting retailers and brought to their attention the names of such retailers (Fdgs 12, 14; Tr. 168, 203, 213, 296, 316). But although a representative of Washington Wholesale Drug Exchange was called as a witness, he was not even asked by Government counsel whether he had curtailed sales to any retailers, and it was not shown that he in fact did so (Tr. 244-62).[17] No representative of Murray Wholesale was even called to testify, and although there is evidence that this

[17] Parke, Davis' branch manager and his assistant assumed, erroneously (See Tr. 197, 204), that all the wholesalers contacted ceased selling Parke, Davis products to the five retailers (Tr. 315-D, 373).

wholesaler was notified of Parke, Davis' policy,[18] there is no evidence that he undertook to, or did, act upon it. Moreover, the evidence shows that another wholesale drug firm not named as a co-conspirator continued to sell Parke, Davis products to at least one of the price-cutting retailers in question (Tr. 197, 204).

This leaves three wholesalers who did respond to Parke, Davis' policy by attempting to curtail sales of Parke, Davis products to the retailers: these are Powers-Taylor, H. B. Gilpin Company and District Wholesale. The president of Powers-Taylor, however, testified as follows:

> "Q. They [Parke, Davis representatives] did not ask you to make any agreement?
>
> "A. No, sir.
>
> "Q. And you did not make any agreement about Standard?
>
> "A. No, sir.
>
> "Q. You understood that, if you sold Standard, you would be cut off?
>
> "A. That is right." (Tr. 219.)

The evidence is the same as to the other two. The president of the H. B. Gilpin Company testified, for instance, that he neither was asked to make any agreement nor did make any agreement with the Parke, Davis representative who communicated with him (Tr. 172); the vice-president of the company explained that the basis for the company's attempt to stop selling to the price cutters was that if it continued to sell to them, it would itself be cut off

[18] A witness from Standard Drug testified that he had telephoned the president of that wholesaler, who "informed me that he had been notified by Parke, Davis and Company not to ship any of our stores their products." (Tr. 203).

by Parke, Davis (Tr. 154). As to District Wholesale, although the vice president of that company said that he had told the Parke, Davis representative, "I will go along with whatever you suggest" (Tr. 287-288; cf. Tr. 280, 289), the president of this company, who actually made the decision to cease selling to the retailers (Tr. 280, 282, 305), testified that the basis of that decision was simply the knowledge that unless the company cut off the retailers it would itself be cut off (Tr. 304).

Once again having considered this evidence as a whole, the trial judge found that

> "There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject." (Fdg 14).

And this finding, like the others, is clearly supported by the proof. On this critical point as on the others, the Government totally failed to prove the allegations of the complaint.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The critical findings of fact made by the District Court demonstrate that Parke, Davis' actions were purely unilateral, and that no element of agreement or conspiracy with the retailers and wholesalers was involved. Appellant urges the Court to review the evidence, set aside these explicit findings, and find that a conspiracy was proven. But those findings of fact, by the terms of Rule 52(a) of the Federal Rules of Civil Procedure,

> ". . . shall not be set aside unless clearly erroneous, and due regard shall be given to the oppor-

tunity of the trial court to judge of the credibility of the witnesses."

And as this Court observed in *United States v. Yellow Cab Co.*, 338 U.S. 338 at 341-42:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

See also *Timken Roller Bearing Company* v. *United States*, 341 U.S. 593, 596-97; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-96:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See United States v. Yellow Cab Co., 338 U.S. 338, 342; United States v. Gypsum Co., 333 U.S. 364, 394, 395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

The findings of the court below, which are supported by "substantial evidence," see *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110; *McAllister* v. *United States*, 348 U.S. 19, 22, are not shown to have been "clearly erroneous." No substantial question on the facts is, therefore, brought before the Court.

Nor is there any substantial question of law presented by the appeal, for the findings of the District Court clearly bring the case within the area of permissible conduct as defined in *United States* v. *Colgate & Co.*, 250 U.S. 300, 307:

> "In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

See also *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 625-26.

Parke, Davis, like the Colgate Company, recommended minimum resale prices to retailers, and attempted to obtain observance of those prices by a policy of refusing to sell to retailers who did not observe them. In carrying out that policy, it did no more than indicate its wishes concerning prices and decline further dealings with all who failed to observe them. See *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99. Parke, Davis did not authorize its agents to seek agreement from retailers or wholesalers, nor did

it obtain such agreement or anything more than "mere acquiescence" in its policy." See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723.

No more than this is to be found in the record of this case: no systematic machinery for the maintenance of prices,[19] no black-listing of price-cutters,[20] no cooperative methods of policing or reporting deviations,[21] no marking of goods so that price cutters can be traced,[22] no licensing agreements[23] or other formal arrangements.[24]

Nor is there any other circumstance in this case to give it substantial public importance. There is not even a suspicion of any adverse effect from the practices here called in question upon the vigorous competition between Parke, Davis and other manufacturers. Those practices occurred only in the two cities of Washington, D.C. and Richmond, Virginia, and over a period of no longer than four months, more than two years

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[19] See United States v. Bausch & Lomb Optical Co., 321 U.S. 707; Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441.

[20] See Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. at 450, 455-56.

[21] See United States v. Bausch & Lomb Optical Co., 321 U.S. at 720, 723; Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. at 454, 455-56.

[22] See United States v. Bausch & Lomb Optical Co., 321 U.S. at 714-15, 717; Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. at 449, 455-56.

[23] See Ethyl Gasoline Corp. v. United States, 309 U.S. 436; United States v. Bausch & Lomb Optical Co., 321 U.S. at 714-17.

[24] See United States v. A. Schrader's Son, Inc., 252 U.S. 85.

ago. They have long since been abandoned.[25] And even when they were in effect they did not achieve the intended purpose. Parke, Davis' attempt to put a stop to price cutting on its products was futile, and was abandoned in favor of an effort to stop just the cut-price advertising. This had some effect for a month—although even during this time there was no effect on the prices at which Parke, Davis products were actually sold to the public—and then this effort, too, failed and was abandoned. Naked assertion cannot give substance to the imaginary danger that the course of action that brought Parke, Davis no success at all "could become a wide-spread method for enforcing illegal resale price maintenance" (Jurisdictional Statement, p. 17).

On the law, in sum, there is no substantial question of variation from the long and well-established line of cases defining the area of permissible conduct by which a manufacturer can seek to maintain the level of its resale prices. On the evidence, which has already been assessed by two trial courts, there is no clear error even suggested that would warrant further consideration by this Court. The Court's observations in the *Yellow Cab* case, 338 U.S. at 339-41, apply fully here:

> "The first question proposed by the Government is whether the evidence sustains the findings of fact by the District Court. This is the basic issue, and the Government raises no question of law that has an existence independent of it. This issue of fact does not arise upon the trial court's disregard or misunderstanding of some definite and well-estab-

[25] The reasons for the abandonment of these practices are discussed by Parke, Davis' assistant general attorney at Tr. 229-32, 234. See Fdg 27.

lished fact. It extends to almost every detail of the decision, the Government saying that the trial court 'ignored . . . substantially all of the facts which the Government deemed significant.'

"What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own.

* * * *

"The Judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

This case is a particularly appropriate one for disposition upon a motion to affirm: the law is well settled, see *Missouri Pacific R. Co.* v. *Castle*, 224 U.S. 541, 544; and the case "as presented here turns essentially on questions of fact," *Bodkin* v. *Edwards*, 255 U.S. 221, 223, and "involves a mere dispute concerning the weight of conflicting tendencies of proof." *Chicago, R. I. & P. R.* v. *Devine*, 239 U.S. 52, 54. See *New Orleans Insurance Exchange* v. *United States*, 355 U.S. 22.

Appellee respectfully submits that the findings were correct and abundantly supported by the record, that there was no collusive agreement or conspiracy, and that its actions were taken unilaterally for valid business reasons and were wholly consistent with law.

CONCLUSION

This appeal presents no substantial question warranting further argument. The judgment of the District Court should be affirmed.

Respectfully submitted,

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JANUARY, 1959.

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No. ~~887~~ 20

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 567

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

Appellee's motion to affirm demonstrates that there is no dispute here as to the essential facts, *i.e.*, the actions taken by Parke Davis in its attempts to enforce resale price maintenance in non-"fair trade" areas. Thus, appellee does not deny that it cut off the price-cutting retailers and induced its wholesalers to do so; and that it resumed selling to those retailers, and permitted its wholesalers to do so, only after they had undertaken to stop, and had stopped, their cut-price advertising.

The basic issue presented by this appeal, therefore, is whether such a course of business conduct amounted to merely the unilateral selection of customers, as the District Court held; or whether, as the Government

contends, it went far beyond "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721) and, under the Sherman Act, constituted an illegal price-fixing conspiracy. Contrary to appellee's contention (Motion to Affirm, p. 4), that question involves far more than the correctness of the trial judge's "assessment of the evidence presented before him"; it squarely raises a "serious question as to the trial judge's understanding or application of the law to the facts as he found them".

For the reasons set forth in our jurisdictional statement (pp. 13–17), we urge that this Court should note probable jurisdiction and decide the important legal questions which this appeal presents.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.

January 1959.

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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 20

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion, findings, and conclusions of the district court (R. 28–41) are reported at 164 F. Supp. 827.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4. The judgment of the district court (R. 27–28) was entered on July 16, 1958, and the notice of appeal was filed on September 11, 1958 (R. 41-42). This Court noted probable jurisdiction of the appeal on February 24, 1959 (R. 43). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as

amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 3 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 3, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in * * * the District of Columbia, or in restraint of trade or commerce * * * between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

The Government's evidence in a Sherman Act civil suit charging a drug manufacturer with illegal price maintenance showed that, in areas which had no "fair trade" laws, the manufacturer had (1) refused to sell directly to retailers who failed to observe its minimum resale prices and/or advertised discount prices on such products, (2) induced and compelled, and obtained agreement from, its wholesale distributors to stop selling to such price-cutting and discount-advertising retailers, and (3) resumed selling to the retailers after they had ceased price cutting or discount advertising and, in some instances, had agreed with the manufacturer to stop advertising discount prices. The evidence further showed that the manufacturer competes with the wholesalers in selling directly to the retailers and that, on pain of their being cut off on its products, it requires the wholesalers to observe its minimum resale prices and prohibits them from giving the quantity discounts which it offers. The evidence also shows that, after the Government had instituted its Sherman Act investigation and partly as a result thereof, the manufacturer had terminated its retail, but not its wholesale, price maintenance practices. The following questions are presented:

1. Whether the district court erred in holding that these practices constituted merely unilateral action by the manufacturer in selecting its customers, which is permissible under *United States* v. *Colgate & Company*, 250 U.S. 300, and not a price-fixing conspiracy between

the manufacturer and the retailers and wholesalers.

2. Whether the district court further erred in holding, as an alternative ground for dismissing the complaint, that no relief was necessary because there was "no reasonable probability" that the defendant would resume its attempts to maintain resale prices.

STATEMENT

On May 2, 1957, the United States filed a civil suit under Section 4 of the Sherman Act charging that Parke, Davis & Co. (Parke Davis) had violated Sections 1 and 3 of that Act by conspiring to fix wholesale and retail prices of pharmaceutical products which it manufactures. The principal terms of the alleged conspiracy were (1) that certain retail drug stores in Washington, D.C., agreed with Parke Davis (a) not to sell its products at less than the resale prices which it fixed and (b) not to advertise such products at discount prices; and (2) that five wholesale druggists (three in Washington and two in Virginia) agreed with Parke Davis (a) not to sell its products at less than the resale prices it fixed and (b) not to sell such products to retail druggists who sold or advertised such products at discount prices (Pars. 13–15, R. 4–5). A number of retailers and the wholesalers were named as co-conspirators, but not defendants (R. 2).[1]

[1] Prior to the filing of the suit, Parke Davis and two of its officials had been indicted for the same violations of the Sherman Act. At the close of the Government's case, the court directed a verdict of acquittal. *United States* v. *Parke, Davis & Company*, D.D.C., Cr. 111-57.

At the conclusion of the Government's evidence, the district court granted the defendant's motion to dismiss and entered judgment of dismissal (R. 27–28). The court held (R. 300) that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint." It ruled that there were no agreements between Parke Davis and its retailers and wholesalers, and that appellee's actions "were properly unilateral and sanctioned by law under the doctrine laid down in the case of *United States* v. *Colgate & Company,* 250 U.S. 300" (R. 30). The court further held, as an alternative ground for dismissal, that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed," and that there was "no reasonable probability or danger" that the practices would be resumed (R. 30).

1. THE FACTS [2]

Parke Davis manufactures and sells approximately 600 different pharmaceutical products (Fdgs. 1, 2, R. 31). It distributes these products to drug wholesalers and retailers in the District of Columbia and Virginia through its Baltimore, Maryland, branch office (Fdg. 1, R. 31). Retailers may buy Parke Davis products either directly from it or through wholesalers; on many items, its own prices are "substantially" lower than the wholesalers' (R. 59, 95–96, 132; Fdg. 5, R. 31–32).

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[2] The statement of the facts is based upon the testimony and documentary evidence introduced by the Government, and certain unchallenged findings of the district court. Except where

Parke Davis has unilaterally established minimum wholesale and retail resale prices (Fdg. 7, R. 32). Its retail catalogue stated that the "Minimum Retail Prices" therein set forth as "applying" in states having "fair trade" laws were also "suggested" for use in states which had not enacted "fair trade" laws (Fdg. 8, R. 32). During the period covered by the complaint, there was no "fair trade" law in effect in the District of Columbia or Virginia (Fdg. 6, R. 32). Parke Davis' wholesale catalogue stated that it was the company's "policy" to sell to wholesalers who observed the "Net Price Selling Schedule" therein set forth (Fdg. 9, R. 32).[3] It was also the company's "accepted custom" that the wholesalers will not sell to retailers who cut prices (R. 250); the wholesalers, however, had never been aware of such "custom" (R. 162, 204–205, 252).

A. PARKE DAVIS' INITIAL EFFORT TO STOP THE SELLING AND ADVERTISING OF ITS PRODUCTS AT CUT-RATE PRICES

In the Spring of 1956, the manager of Parke Davis' Baltimore branch office was aware that certain retailers in the District of Columbia and Virginia were advertising and selling Parke Davis products below the "suggested" resale prices (R. 251–252, 311). However, at that time he did not know of any company policy not to sell to price-cutting retailers in non-"fair trade" areas (R. 250–251, 277–278). He first learned of such policy from the president of

otherwise indicated, we believe that this evidence is substantially uncontradicted.

[3] The facts with respect to Parke Davis' wholesale price maintenance are set forth in the Argument, *infra*, pp. 36–40.

Parke Davis at a branch managers' meeting in June, 1956, at the company's main office in Detroit (R. 251–252). After that meeting, he instructed his field manager for Washington and Virginia "to contact these price-cutting retailers and tell them if they did not observe your [Parke Davis'] prices they would be cut off," and also "[i]nstructed him to go to the wholesalers and say 'We don't want you to sell to these price-cutting retailers' " (R. 253, 274–275).

The field manager carried out his instructions. Early in July 1956, he (and or other Parke Davis representatives) visited the retailers which had been advertising and selling Parke Davis products at cut-rate prices,[4] and told them that, unless they ceased doing so, they would be cut off, both on direct purchases from Parke Davis and on purchases through wholesalers (R. 60, 100–102, 117–118, 147, 151–152, 221, 226, 241). Thus, McReynolds Pharmacy was informed by the Parke Davis representative "that it was the policy of the main bosses that there will be no price-cutting on Parke, Davis merchandise, and if we continue to cut prices, they will no longer sell us * * * [and will] see that [we] do not get the merchandise" (R. 101). The Parke Davis representative also stated to Haft, the operator of Dart Drug, "that he had already that day contacted Drug Mart Stores" and "had told them the same thing; they would be cut

[4] These retailers were Dart Drug, Standard Drug, State Drugs, Babbitt's, McReynolds Pharmacy, Peoples, and Drug Mart (R. 147, 226, 254). The latter is a group of 30 independent drug stores "who got together to advertise and buy cooperatively" (R. 146; 104–105).

off from their source of supply if they didn't bring their prices up—and they had indicated that they would raise their prices" (R. 60); and that "they would go to Peoples Drugstores, to Tate's Drugstores, to Standard Drugstores, to Babbitt's stores, and anyone else that was applicable in this area" (R. 61).

Despite these threats, the retailers, with two exceptions (see *infra*, p. 9), refused to go along with Parke Davis (Fdg. 13, R. 34). The operator of McReynolds stated that, until he had "equaled" the advertising of the others, he would not be "interested in going along" (R. 102). The president of State Drugs, upon being informed by the Parke Davis representative that the others had ceased their cut-rate practices, stated that "if what you say is true, then I will cease, also" (R. 117–118); however, when he learned through a phone call to Dart Drug that the statement was not true, he informed the Parke Davis representative that he would have "to leave my sign on the window" advertising Parke Davis products at discount prices (R. 118). Haft of Dart Drug similarly refused (R. 61); and he complained that a number of Peoples Drug stores, including one directly across from his store, were cutting prices on Parke Davis products (R. 63, 225).

The Parke Davis representative informed Haft that he "would see Peoples and try to get them in line" (R. 225). He then advised a vice-president of Peoples that it would be cut off if it continued to cut prices (R. 226, 241). Because of this threat,

Peoples agreed that it would "go along with" Parke Davis' "plan" (R. 241).[5]

Also, in the summer of 1956, a Parke Davis representative told the coordinator of the Drug Mart (see note 4, *supra*) that "Peoples was going to stop cutting prices, or had stopped cutting prices * * * and asked me whether we would go along. He also said at the time that, if we did not stop cutting the price, that P-D would find a way to cut our stores off from direct buying, or from buying the P-D products. I told him at the time that I would go along with him; that, as long as Peoples went along, I would go along" (R. 147; see, also, R. 106). Drug Mart discontinued its cut-rate advertising (R. 147–148, 150, 106–107; GX 7 (not printed)).[6]

B. THE CUTTING-OFF OF THE OFFENDING RETAILERS BY PARKE DAVIS AND ITS WHOLESALERS IN ACCORDANCE WITH ITS THREATS

In accordance with its threats, Parke Davis stopped selling directly to the retailers who continued to advertise and sell Parke Davis products at discount

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[5] The conversation, as described by the Parke Davis official, was as follows (R. 241):

Q. Now, what did Mr. Downey [the Peoples vice-president] say to you?

A. He said, "Do you mean that you would cut us off?"

I said, "Well, according to our policy, that is the only thing we could do, Mr. Downey."

Q. What did he say?

A. He said, "Well, I see no reason why we can't go along with it."

But, he says, "We can't sit here forever and let this man [Haft of Dart Drugs] demoralize everything."

But, he said, "We will go along with your plan."

[6] The 30 stores in the Drug Mart group advertised in the newspapers only as a group and not individually (R. 113, 149).

prices (R. 62–63, 102, 218–219, 228–229, 254). Parke Davis also instructed or requested its wholesalers in Washington and Richmond not to sell Parke Davis products to them (R. 70–71, 96, 103, 115, 124–125, 137–138, 153–154, 157–158, 164, 197–198, 205–208, 219, 228), and informed the wholesalers "that they were visiting all wholesalers in this area on the same problem" (R. 126; 138, 197–198). Thus, the Parke Davis representatives had the following conversation with the vice-president of District Wholesale Drug (R. 197–198):

> Q. Can you tell us what was said during this conversation with these representatives?
>
> A. They asked me not to sell a group of retailers until a price situation was straightened out.
>
> Q. Did they name these retailers to you, sir?
>
> A. Yes, they did.
>
> * * * * *
>
> Q. What did you tell them, sir?
>
> A. I asked them if they were requesting it of me alone, or would they go to other wholesalers. And they said they would visit the local wholesalers. And then I agreed to abide by it.
>
> Q. You agreed to abide by their request?
>
> A. That is correct.[7]

[7] Again, at R. 202, this witness testified on cross-examination:

A. The one thing that did concern me, I specifically asked them if we were the only wholesaler who would have that request made. And they said no, they were visiting all three local wholesalers. And I said, "Well if that is the case, I will go along with whatever you suggest."

The president of District Wholesale Drug similarly asked the Parke Davis representatives "the same question, whether other wholesalers are to be informed in the same manner" (R. 206–7).

The wholesalers were aware that, if they continued selling to the price-cutting retailers, they would, in turn, be cut off by Parke Davis (R. 130, 210, 271). They, therefore, "cooperated" or "agreed" with Parke Davis (R. 198, 219, 254), and refused to fill the retailers' orders for Parke Davis products (R. 68, 71, 103–104, 113–114, 118–119, 165–166),[8] marking the orders as "Out" even though they were in stock (R. 72, 103, 114, 144–145, 201, 215).[9] As a result, with one brief exception,[10] the five retailers were cut off on

[8] Two of the wholesalers testified that, had it not been for Parke Davis' actions, they would not have cut off the retailers (R. 142, 168, 219). After one of the wholesalers instructed his personnel to "cut" (*i.e.*, fill only part of) Dart's orders for Parke Davis merchandise, he was again visited by Parke Davis representatives who stated that "they had seen an invoice of ours in a store" indicating "that we had shipped some Parke Davis merchandise" and that "they wanted us to discontinue it" (R. 126–127). As a result, this wholesaler "[c]ut Dart off completely" (R. 127).

[9] Although the wholesalers instructed their personnel not to fill Parke Davis orders for the retailers (R. 126–127, 144–145, 164, 198, 208, 214–215), a few orders might have "slipped through" (R. 199, 212, 257) or have been filled by "mistake" (R. 130; see also R. 93–94, 115). In addition, one of the wholesalers in Richmond, Virginia, apparently did fill orders for one of the retailers (R. 158).

[10] A couple of weeks after Dart Drug had been cut off on July 3, 1956 (R. 72), Parke Davis' Baltimore office told Haft of Dart that if he "would stop advertising" cut-rate prices, Parke Davis would resume selling to him, and that if he stopped, "everyone else would" (R. 224–225, 232, 64). Haft "agreed to stop the advertising" (R. 64). From July 19 to July 27, 1956, Dart Drugs again received some shipments from Parke Davis (R. 72, 64–65, 225). However, it was again cut off a couple of weeks later when, following a complaint by Haft that other stores were again advertising discounts, Dart Drug also resumed such advertising (R. 65–66, 225).

Parke Davis products for approximately seven weeks in July and August, 1956 (R. 72, 114–115, 119, 230, 256–257).

C. PARKE DAVIS' SECOND EFFORT TO ELIMINATE PRICE-CUTTING ADVERTISING

On August 28, 1956, the manager of Parke Davis' Baltimore office visited three of the retailers in Washington who had been cut off—Dart, State, and McReynolds (R. 230, 232–233, 256–257, 260–261). They asked Haft of Dart "if I had had enough, if I was willing to agree to their terms * * * they said if I would discontinue advertising, as per the former agreement, take the signs out of the window * * * that they would resume shipment * * * (R. 73)."[11] Haft "discontinued advertising, took the signs off the window, and took the cards out of the window * * *" (R. 74), and he was then "able to again obtain Parke Davis products direct from the company" and also from the wholesalers (R. 74–75).[12] The Parke Davis officials also stated to Haft "that they had gotton Standard Drug, Babbitt, Tates [*sic*], Peoples and all the rest of the retailers back in line * * * in reference to advertising and window displays on Parke Davis items"

[11] The Parke Davis officials testified that the suggestion to discontinue advertising was not made by them, but by Haft (R. 232–233, 258).

[12] On December 12, 1957, after Haft had testified in the criminal case which resulted in acquittal (see *supra*, note 1), Parke Davis advised him by letter (R. 307) that it would no longer sell directly to him (R. 81–82). Since that date, Haft has been obtaining Parke Davis products only from wholesalers—but at "substantially higher" prices than on direct purchases from Parke Davis (R. 95–96).

(R. 74), and that "everyone else would stop advertising" (R. 85). Haft gave the Parke Davis officials "his word on the 28th of August that he would not advertise cut prices" (R. 260, 74; 314).[13]

The Parke Davis officials asked the operator of State "if I would be willing to take my prices down and of course sell it on the inside [at cut prices] if the other so-called discount stores ceased advertising in the paper, and I informed him that I would be very happy to; I would agree to that" (R. 119).[14] Approximately a week later, the Parke Davis officials returned and indicated "that everything was O.K. and that I accepted, and of course I assumed that meant that I could take my signs down and sell the vitamins at reduced prices on the inside, which I proceeded to do" (R. 120). Similarly, the Parke Davis officials told a McReynolds partner that "If you fellows would be willing to go along to the extent, since you do not advertise in the newspaper, if you

[13] The reason that Parke-Davis was so anxious to stop the cut-rate advertising is explained in the testimony of Powers, the assistant manager of the Baltimore branch office. He stated that Parke Davis "never had any problem" with price cutting in the area until the "widespread newspaper advertising" began (R. 221-222); that if they could control the advertising "it would take the bang out of it, or the so-called impetus that advertising was causing" (R. 221), and would give Parke Davis "some measure of control over the price situation" (R. 223); and that the advertising was "demoralizing" (R. 222-223). See *infra*, p. 24, n. 17.

[14] This witness further stated that "everything was verbal, and as far as any commitment goes, that was the way I understood the conversation, that if the other stores would cease advertising in the paper, I would proceed to take my signs down, and that is the way it was left" (R. 120).

would just take your signs down, we could again do buying and business together" (R. 109–110). After McReynolds "agreed temporarily that we might take these signs down" (R. 110) and "stop[ped] all of our signs which was the only extent of our advertising", it was "then able to buy direct from Parke Davis again" (*ibid.*).[15]

On August 28, 1956, or shortly thereafter, the Baltimore manager advised all the wholesalers that "they could again sell to these retailers" (R. 260–261; see R. 74–75, 130, 138, 167, 209–210, 235). Except for one advertisement, for several weeks thereafter there was no cut-rate advertising in the Washington newspapers by the retail drug stores which previously had been cut off (R. 262), or by Peoples (R. 107–109) or Drug Mart (R. 147–148, 229–230) (see pp. 8–9, *supra*). Such advertising was not resumed in the District of Columbia until November, 1956, when Standard Drug ran "a cutrate advertisement on Parke Davis items" (R. 75, 262). A Parke Davis representative requested Dart not to follow suit "and [to] give him a chance to straighten the situation out", but this request was refused (R. 75–76). The retailers

[15] One of the Parke Davis officials testified that, after telling the State operator that Haft of Dart had suggested stopping advertising, he asked him "would they want to go along on such a policy as that or such a plan," and the State man indicated that "it was acceptable" to him (R. 233). Similarly, he testified that the McReynolds representative stated that "if Dart would not advertise, we are interested in doing business with you and we will take our signs out of the windows" (R. 233–234). See also R. 260–264, for further testimony that the Parke Davis officials told State and McReynolds that Dart had agreed to stop advertising.

"again started advertising" and "[blew] up the minimum retail price situation in Washington" (R. 263). Parke Davis made no further effort to stop the advertising (R. 76, 110–111, 122).

2. THE DECISION OF THE DISTRICT COURT

In holding that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint" (R. 300), the district court stated (R. 29) that Parke Davis had "well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell"; that Parke Davis' representatives "notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy"; that the representatives "likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant"; that "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others"; and that "both wholesalers and retailers valued defendant's business so highly that they acceded to its policy." The court concluded (R. 30) that "there was no coercion by defendant and no agreement with co-conspirators," and that Parke Davis' "actions * * * were properly unilateral and sanctioned by law under

the doctrine laid down in the case of *U.S.* v. *Colgate & Company*, 250 U.S. 300." [16]

The court further ruled that in the fall of 1956 Parke Davis "abandoned in good faith its efforts to maintain minimum resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products" in the District of Columbia or in Virginia. The court stated (R. 30) that, although Parke Davis' assistant general attorney had testified that its abandonment of attempts to enforce "fair trade" prices in the District was "in some measure" the result of Parke Davis' having learned of the Department of Justice investigation of the matter, it was "evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field." The court found (Fdg. 27, R. 38) that "[t]here is no proof or indication of any intention on the part of Parke, Davis to resume" its "efforts" to "compel the cessation" of retail price cutting in the District and Virginia. The court concluded (R. 30–31) that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from

[16] In its findings, the court found (Fdgs. 21–23) that Parke Davis did not solicit any agreement with Drug Mart, Standard Drug, or Dart Drug with respect to prices or advertising, and that neither Drug Mart nor Standard entered into any such agreement with Parke Davis.

doing as alleged where there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated, would be an empty gesture."

SUMMARY OF ARGUMENT

I

A. Parke Davis' activities to maintain retail resale prices in the District of Columbia went far beyond any rights it might have under *United States* v. *Colgate & Co.*, 250 U.S. 300. While *Colgate* sanctions "a simple refusal to sell to customers who will not resell at prices fixed by the seller," it does not permit "express or implied" "arrangements as to prices" (*United States* v. *Bausch & Lomb*, 321 U.S. 707, 721, 722, 729). Parke Davis did not merely inform the retailers of its price-maintenance policy, and then stop selling to those who refused to observe that policy. It (1) threatened to cut off the offending retailers if they persisted in cutting prices; (2) cut them off on direct purchases, and organized a boycott of the retailers by the wholesalers designed to dry up all sources of supply of Parke Davis products; and (3) did not resume selling Parke Davis products to the retailers, or permit the wholesalers to do so, until the retailers had undertaken to stop cut-rate advertising, and thereby to minimize the effectiveness of their price competition. In repeated visits to the offending retailers, Parke Davis made it clear that its actions were part of an organized campaign directed against all price-cutting retailers in the area, and that it was similarly approaching, and getting assurance of "co-

operation" from, all of them. Similarly, in inducing its wholesalers to boycott the price-cutting retailers, Parke Davis made it clear that such "cooperation" was being sought and obtained from all its wholesalers.

These facts, resting on undisputed testimony, much of it provided or corroborated by the Parke Davis officials, clearly establish an illegal price-cutting conspiracy. It is not negated by the testimony of some (but not all) of the witnesses that they had not entered into any formal "agreement" with Parke Davis to do what they in fact did.

The fact that Parke Davis not only itself refused to sell to the offending retailers, but also organized a boycott of them by the wholesalers in the District of Columbia, is further proof that Parke Davis' conduct went far beyond any permissible selection of customers. It was, instead, coercion of its customers, intended to compel them to observe its "suggested" resale prices in a non-"fair trade" area. Participation by the wholesalers in Parke Davis' campaign, while obviously unnecessary if Parke Davis was merely exercising its right to sell to whom it chose, was essential for Parke Davis to achieve its aim of stopping price cutting in the District. The retailers could be brought to terms only by closing off all their sources of supply. Such a combination of manufacturers and wholesalers to boycott retailers refusing to maintain "suggested" resale prices has uniformly been held to constitute a *per se* violation of the Sherman Act.

B. Parke Davis' continuing actions to maintain its "suggested" wholesale resale prices in the District of Columbia amount to far more than a seller's unilateral selection of its customers, permissible under *Colgate*. Parke Davis and its wholesalers sell directly to many of the same retailers and are in direct competition for their business. Parke Davis requires its wholesale customers, upon pain of being cut off, to adhere to the resale prices which it prescribes, and does not permit them to make available to their retail customers the substantial quantity discounts which Parke Davis offers retailers dealing directly with it. Parke Davis' restriction is thus designed to insure that the wholesalers, whom it concedes can render better service than it can, will not compete with it pricewise. And, as the record makes clear, the wholesalers followed Parke Davis' "suggested" resale prices, not because they adopted such prices in the exercise of their own business judgment, but because Parke Davis requires them to do so.

Where, as here, a manufacturer who is in direct competition with its wholesalers in selling to retailers compels the wholesalers to follow its "suggested" resale prices, it engages in illegal price fixing. Since the District of Columbia is not a "fair trade" area, Parke Davis could not have entered into express agreements requiring its wholesalers to observe its resale prices. The decision below, by treating these price-maintenance understandings and implied agreements as involving merely the unilateral selection of customers, thus permits Parke Davis to do indirectly what it could not do directly.

II

The district court held, as an alternative ground for dismissing the complaint, that the Government was not entitled to injunctive relief because there was "no reasonable probability" (R. 30) that Parke Davis would resume its attempts to fix resale prices. It stated that Parke Davis had abandoned its resale price-maintenance efforts in 1956 because of "business and economic conditions in its field", and that, "under the long-continuing competitive conditions", the company could not resume its price-fixing endeavors except at a "heavy financial loss".

But the only evidence in the record showing the reasons for abandonment of Parke Davis' attempts to enforce retail "fair trade" prices in the area is the testimony of a Parke Davis official that one of the reasons therefor was the Government's antitrust investigation. There was no evidence establishing the "economic conditions" conjectured by the court or the "long-continuing competitive conditions" purporting to make resumption impracticable. Further, there is nothing in the record which indicates that Parke Davis has ever abandoned its conspiracy with the wholesalers under which the latter adhered to resale prices fixed by it; the district court, therefore, plainly erred in holding that there was no need for relief with respect to this specific allegation of the Government's complaint.

The price-fixing schemes here involve subtle and implied agreements and understandings of a type necessarily difficult to uncover. In this situation, we

submit that the Government establishes a prima facie case for relief upon showing that the defendant has committed the violations charged, and the defendant then has the burden of coming forward to show that special circumstances exist which make relief unnecessary in the particular case. The existence of such circumstances necessarily lies peculiarly within the knowledge of the defendant. Since it was Parke Davis which raised the issue that there was no need for relief, it was incumbent upon it to show that there was no reasonable expectation that the wrong would be repeated. Instead, Parke Davis did not even disclaim any intention to resume its price-fixing attempts, much less to show that, because of economic or other conditions, relief is unnecessary.

ARGUMENT

I

PARKE DAVIS HAS ENGAGED IN ILLEGAL PRICE-FIXING ACTIVITIES WITH RESPECT TO RESALE OF ITS PRODUCTS AT BOTH THE RETAIL AND WHOLESALE LEVELS

As the undisputed facts of record make clear, Parke Davis, with the forced cooperation of the co-conspirator wholesalers, undertook in 1956 to fix the resale prices charged for its products by retail drugstores in the District of Columbia and Virginia (which were not then "fair trade" areas) and, when these efforts proved only partly successful, undertook similar efforts to eliminate advertising of retail price cutting. It also required the wholesale drug dealers in the area, with whom it directly competes in sales to retail druggists, to maintain fixed prices and pricing practices

as a condition of their carrying Parke Davis products. While these efforts admittedly would be illegal if the result of "agreement" or "conspiracy", the court below concluded that Parke Davis' activities in both areas were limited solely to unilateral action permissible under *United States* v. *Colgate & Company*, 250 U.S. 300.

In the *Colgate* case, this Court stated (250 U.S. at 307) that, absent "any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." However, less than a year later, the Court explained that *Colgate* involved an "interpretation of an indictment" as "fail[ing] to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same' ". *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99. The Court pointed out (*ibid.*) that there was an "obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers

throughout the different States which undertake to bind them to observe fixed resale prices."

Since that time this Court has carefully distinguished "between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices * * *." *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 729. While *Colgate* indicates that "a simple refusal to sell to customers who will not resell at prices fixed by the seller" is permissible under the Sherman Act" (*id.*, at 721; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 454), the seller "may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade" (*Beech-Nut* case, *supra*, p. 453; *Bausch & Lomb* case, *supra*, p. 722). Furthermore, it is settled that "the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances" (*Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210; *Schrader* case, *supra*, p. 99).

As we shall show, Parke Davis' activities in attempting to maintain resale prices in the District of Columbia plainly went far beyond "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch & Lomb*, *supra*, p. 721); "[a]s in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers [and retailers] in [Parke Davis'] * * * published resale price list" (*id.*, p. 723).

A. THE RETAIL PRICE MAINTENANCE SCHEME

Parke Davis did not merely inform the retailers of its price-maintenance policy, and then stop selling to those who refused to observe that policy. On the contrary, it embarked upon a definite campaign to end "the price-cutting situation that existed in Washington" (R. 252, 232, 217) and the accompanying "demoralizing" price-cutting advertising (R. 315–316). To do this, it (1) threatened to cut off the offending retailers if they persisted in cutting prices; (2) cut them off on direct purchases, and organized a boycott of the retailers by the wholesalers designed to dry up all sources of supply of Parke Davis products; and (3) did not resume selling Parke Davis products to the retailers, or permit the wholesalers to do so, unless the retailers had undertaken to stop cut-rate advertising, and thereby to minimize the effectiveness of their price competition.[17] The entire campaign was carried on through repeated visits by Parke Davis officials to the offending retailers, who were urged to "go along and play the game regularly * * * according to the rules" (R. 225), and who were advised that Parke Davis similarly was

[17] Parke Davis officials testified that elimination of the advertising was an important step toward "control over the price situation" (R. 223) which would "take the bang out of" the price-cutting (R. 221; see, also, R. 222, 237, 246). The Parke Davis area manager stated that he "didn't differentiate between the two [price cutting and cut-rate advertising]" (R. 254; see, also, R. 262). As this Court has recognized, "Modern competition for business finds advertising one of the most usual and useful of weapons." *Franklin National Bank* v. *New York*, 347 U.S. 373, 377.

approaching their competitors. See the Statement, *supra*, pp. 6–14.

The record thus shows that Parke Davis was the moving party in a price-fixing scheme of the type which has been repeatedly and consistently condemned as illegal under Section 1 of the Sherman Act. *Bausch & Lomb, Beech-Nut* and *Schrader* cases, *supra; Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; cf, *Connecticut Importing Company* v. *Continental Distilling Corp.*, 129 F. 2d 651 (C.A. 2); *Shakespeare Co.* v. *Federal Trade Commission*, 50 F. 2d 758 (C.A. 6); *Moir* v. *Federal Trade Commission*, 12 F. 2d 22 (C.A. 1); *Q.R.S. Music Co.* v. *Federal Trade Commission*, 12 F. 2d 730 (C.A. 7); *Toledo Pipe-Threading Machine Co.* v. *Federal Trade Commission*, 11 F. 2d 337 (C.A. 6).

1. Parke Davis made it clear to the retailers, both in its initial discussions and during the subsequent negotiations which resulted in their discontinuing the cut-price advertising, that its actions were part of an organized campaign directed against all price-cutting retailers in the area. Thus, a Parke Davis official testified that when Haft of Dart Drug complained that Peoples Drug was cutting prices on Parke Davis products, he told Haft that he "would see Peoples and try to get them in line" (R. 225). And, after Peoples had, in the words of the official, agreed to "go along with your plan" (R. 241), Drug Mart was induced to stop its advertising, in part, by being told that Peoples "was going to stop cutting prices, or had stopped * * *" (R. 147). Haft testified that when the Parke Davis sales representatives visited

him in July, 1956, they advised him that they had "already that day contacted Drug Mart" and that, after it had been advised it would be "cut off" if it did not cease its price-cutting activities, it had "indicated" it would stop (R. 60). They also stated that they would see a number of other price cutters "and anyone else that was applicable in this area" (R. 61). When the proprietor of State Drugs told the Parke Davis representative that it would be impossible for him to stop price cutting as long as others "were actually advertising it in the paper", the latter stated "that that had ceased" and State proposed to follow suit until it discovered that discounts were still in effect at its competitors (R. 117–118).

Similarly, the subsequent efforts of appellee to halt retail price cutting advertising involved far more than individual negotiations with particular retailers. For example, when the company endeavored in July 1956 to induce Haft of Dart to stop further price cutting advertising in return for being allowed to replenish his stocks of Parke Davis products, he was told that "all the rest of the stores were already in line, that is Drug Mart, Peoples, Babbitt and Standard; that I was the last one; that now that I was in line that he would give me his word that now that I stopped advertising, everyone else would stop advertising" (R. 64). As this turned out to be untrue, Haft recommenced his advertising and was once again cut off (R. 65–66, 224–225).

When in late August, Parke Davis made a new, more successful effort to "get some order out of chaos"

(R. 234), it was put forward frankly on the basis of a common understanding among the retailers. Thus, according to a Parke Davis official, State Drugs was informed that Parke Davis "had talked with Haft", who had indicated he would "take down his signs" though continuing to sell at cut rate, "and that there was a possibility we could straighten it out, would they want to go along on such a policy as that or such a plan?" (R. 233, see 119, 260–261). After the operator of State indicated that that would be satisfactory "if the other store would cease advertising in the paper" (R. 119–120, 233), the Parke Davis representatives returned a week later to "acknowledg[e] that everything was O.K." (R. 120). Similarly, Haft was told that "all the rest of the retailers [were] back in line * * *" (R. 74) and "everyone else would stop advertising" (R. 85).[18] And the proprietors of McReynolds Pharmacy were told that "Dart had said that it would not advertise" (R. 233–234). Accordingly, for a period of almost three months there was general adherence to the no-advertising plan, but when one retailer, Standard, subsequently did advertise, the entire common effort "bl[ew] up" (R. 263).

In inducing its wholesalers to boycott the price-cutting retailers, Parke Davis similarly made it clear that such "cooperation" was being sought and obtained from all of the wholesalers. The manager of the

[18] Dripps, the Parke Davis area manager, testified that, as a result of this discussion, Haft apparently gave his word "that he would not advertise cut prices" (R. 260). On September 25, 1956, Dripps wrote Haft: "Just a note to tell you it's a pleasure to do business with a man of his word" (R. 314).

Henry B. Gilpin Company, who had told the Parke Davis people he "didn't see how we could police this price cutting and that I [could] not give them any answer in any way whether we would go along with them or not at that time" (R. 126), testified that the Parke Davis representatives expressly stated "they were visiting all wholesalers in the same area on the same problem" (*ibid.*). The Vice-President of District Wholesale Drug stated that "I specifically asked them if we were the only wholesaler who would have that request made. And they said no, they were visiting all three local wholesalers. And I said 'Well, if that is the case, I will go along with whatever you suggest' " (R. 202, see also R. 198, 206, 207).

These facts, resting on undisputed testimony,[19] much of it provided or corroborated by Parke Davis offi-

[19] Appellee contends (Motion to Affirm, pp. 14, 15) that the "main prop" of the Government's case is Haft (of Dart Drug), and that the testimony of this witness is unreliable because it was inconsistent and was contradicted in several respects by other witnesses; and because Haft himself is interested in bringing a treble damage suit against Parke Davis. However, with a minor exception (see note 11, *supra*, p. 12), Haft's testimony, as cited herein, is fully corroborated by the other retailers and the Parke Davis representatives. Rather than being the "main prop" of the Government's case, he was but one of many important witnesses.

Appellee also attempts to minimize the damaging testimony given by the operators of State Drugs and McReynolds Pharmacy, on the ground that in the Government's answer to interrogatories, neither "was even alleged to be a co-conspirator" (Motion to Affirm, p. 16). In answering the defendant's interrogatories, the Government listed among the retail conspirators "The Drug Mart group" (R. 20), which includes State and McReynolds as members (Fdg. 24, R. 37). But even assuming that these two companies should have been specifically designated as co-conspirators and that interrogatories have the

cials, clearly require rejection of the lower court's finding that "every visit made by the [Parke Davis] representatives to the retailers and wholesalers was, to each of them, separate and apart from all others" (R. 29). Contrary to the finding, the record is undisputed that the visits were part of a single coordinated effect by Parke Davis to halt retail price cutting and cut-rate advertising of its products in the District of Columbia, and that both the retailers and the wholesalers were aware that their competitors were also being asked to participate in the elimination of price competition, and had undertaken to do so. These facts, without more, are strong evidence that Parke Davis had entered into an illegal price-fixing conspiracy with the retailers and wholesalers.

In *Interstate Circuit* v. *United States*, 306 U.S. 208, the trial court, in finding an illegal conspiracy in violation of the Sherman Act, had relied "on inferences drawn from the course of conduct of the alleged conspirators" (p. 221). In affirming the finding of conspiracy, this Court stated (pp. 226–227):

> * * * It was enough that, knowing that concerted action was contemplated and invited, the

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effect of limiting a party's proof (but see Moore, *Federal Practice* (2d ed.), Vol. 4, ¶ 33.29, pp. 2344–45; *McElroy* v. *United Airlines*, 21 F.R.D. 100, 102 (W.D. Mo.); *RCA Mfg. Co.* v. *Decca Records*, 1 F.R.D. 433, 435 (S.D.N.Y.)), evidence as to their participation in the plan was admitted without objection and therefore is part of the record (see Rule 15(b) of the Federal Rules of Civil Procedure: *Cathedral Estates* v. *Taft Realty Corp.*, 228 F. 2d 85, 87 (C.A. 2); *Underwriters Salvage Company of New York* v. *Davis & Shaw Furniture Company*, 198 F. 2d 450, 453 (C.A. 10); *Balabanoff* v. *Kellogg*, 118 F. 2d 597 (C.A. 9)).

> distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.
>
> * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. * * *

See, also, *United States* v. *Masonite Corp.*, 316 U.S. 265, 274–275; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 716, n. 17.

2. When some of the retailers refused to accede to Parke Davis' demand that they cease price cutting, Parke Davis not only refused to sell to them directly, but also "persuaded" all of the wholesalers in the District of Columbia not to sell to them. See the Statement, *supra*, pp. 9–12. The wholesalers were aware that failure to acquiesce in Parke-Davis' campaign would lead to their being cut off on Parke Davis' products (R. 130, 210, 271), and they were informed by Parke Davis that all of the wholesalers were being approached and had agreed to "cooperate" in the program (see *supra*, pp. 10, 27–28). As a result, the wholesalers refused to sell Parke Davis' product to the offending retailers, even going so far as to mark such products "out" on the retailers' orders, even though the items were in stock (see *supra*, pp. 11–12). That the wholesalers' refusal to sell to the retailers was the result of Parke Davis' pressure

rather than their independent business judgment is further shown by the fact that they did not resume selling to the retailers until Parke Davis had given them the green light, after it had reached an "understanding" with the retailers that the cut-rate advertising would cease.

Participation by the wholesalers in the Parke Davis' campaign against the price-cutting retailers, while obviously unnecessary if Parke Davis was merely exercising its right to sell to whom it chose, was essential for Parke Davis to achieve its aim of stopping price competition in the District. For, as long as the retailers had an alternative source of supply of Parke Davis' products through the wholesalers (although at somewhat higher prices, R. 59, 132, 141; see Fdg. 5, R. 31–32), the exercise by Parke Davis of its right under *Colgate* merely to refuse "to sell goods to persons who will not sell at stated prices" (*Federal Trade Commission* v. *Beech-Nut Co.*, 257 U.S. 441, 454) would not be effective to force the retailers to stop cutting prices. The retailers could be brought to terms only by closing off all of their sources of supply.[20] Parke Davis ac-

[20] A Parke Davis witness testified that it had not been "necessary" to enlist the support of wholesalers in previous boycotts of offending retailers, since at that earlier period (before Parke Davis sold to wholesalers at prices cheaper than it sells directly to retailers) "it cost [retailers] more money through the wholesaler" and thus to "the people that were trying to buy from us at a better price, the wholesalers [higher] price did not amount to anything" (R. 244).

complished this by organizing and carrying out a boycott by the wholesalers.[21]

The conduct of this boycott by Parke Davis plainly went beyond "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch and Lomb Co.*, 321 U.S. 707, 721). It was, instead, "coercion of its customers" (*id.*, p. 722), intended to "get some order out of chaos" (R. 234) by inducing the retailers "to go along and play the game regularly * * * according to the rules" (R. 225). For Parke Davis hoped that after the retailers had "had enough" (R. 64), they would capitulate to its demands and undertake to adhere to Parke Davis' "suggested" resale prices in a non-"fair trade" area.

The record shows the same kind of "boycotts of price cutters" as a means of "suppress[ing] the freedom of competition by coercion of its customers" (*Bausch & Lomb*, p. 722) which were condemned in *Beech-Nut* as going "beyond the exercise of this right" "simply [to] refuse" to sell to price cutters, and thus being illegal because they "unduly hinder or obstruct the free and natural flow of commerce" (257 U.S. at 452, 453). Moreover, "this is not a case of a single trader refusing to deal with another" (*Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207, 212), but of a "group boycott" of the type which has "long been

[21] In marked contrast to the forced participation of the wholesalers in Parke Davis' efforts to control the retail price situation in the area as a whole, is Parke Davis' subsequent termination of all further direct dealings with the individual retailer, Haft (R. 307), which did not involve any effort to preclude the wholesalers from selling to him (R. 82).

held to be in the forbidden category [of *per se* violation]" (*ibid.*). Such a combination of manufacturer and wholesalers to boycott retailers refusing to maintain "suggested" resale prices has uniformly been held to violate the Sherman Act, regardless of whether the wholesalers were willing participants and beneficiaries of the scheme or merely joined with the manufacturer out of fear of being boycotted themselves. See *Federal Trade Commission* v. *Beech-Nut Packing Co.*, *supra*, at 448;[22] *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436; *United States* v. *Univis Lens Co.*, 316 U.S. 241; *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707; *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (combination of retailer and wholesalers to force price-fixing agreement on manufacturer); *Armand Co.* v. *Federal Trade Com-*

[22] In *Bausch & Lomb*, *supra*, at 722, this Court, discussing the factors present in *Beech-Nut* which went beyond a simple refusal to sell to price cutters, referred to two other types of actions in addition to "boycotts of price cutters". These were (1) the use of "special agents of the company" to police the price maintenance scheme; and (2) the use of "reports of competitors about customers who violated resale prices". Both of these elements are also present here. Agents of Parke Davis, including supervisory personnel not normally in direct contact with retailers, were dispatched on special missions to warn the offending retailers that Parke Davis would cut them off if they did not cease price cutting (or later cease price cut advertising). (See the Statement, *supra*, pp. 7-9, 12-14.) These agents also policed the subsequent boycott, reporting with disapproval incidents they had discovered of "leakage" of Parke Davis products from wholesalers to a boycotted retailer (R. 126). Moreover, while the Parke Davis salesmen were the principal source of information to the company about retail price cutters, other retailers also supplied names (R. 225, 239).

mission, 78 F. 2d 707 (C.A. 2); *Cream of Wheat Co.* v. *Federal Trade Commission*, 14 F. 2d 40 (C.A. 8); *Moir* v. *Federal Trade Commission*, 12 F. 2d 22 (C.A. 1); *Victor Talking Machine Co.* v. *Kemeny*, 271 Fed. 810, 818 (C.A. 3); *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24 (C.A. 6).

3. Appellee emphasizes (Motion to Affirm, pp. 8–9, 13–14, 19–20) that the retailers and wholesalers testified that they had not entered into any price-fixing "agreement" with Parke Davis (R. 139, 167, 241, 271–272);[23] and that Parke Davis officials testified that they had no authority to, and did not, enter into such "agreements" with their customers. But the crucial question is what these individuals did, not how they subsequently described it in their testimony.[24] As we have shown, the uncontradicted evidence establishes that, in actual fact, Parke Davis did enter into price-fixing agreements with its re-

[23] Other retailers, however, did use the word "agreement" and "agree" in describing their dealings with Parke Davis (R. 64–65, 110, 112, 119, 198, 203).

[24] The artificiality of appellee's position is shown by a memorandum by J. A. Bradshaw, Parke Davis' assistant general attorney (R. 169), dealing with the company's right to refuse to sell to stores which fail "to maintain Fair Trade Prices" (R. 312). Bradshaw reached the following conclusion (*ibid*):

"The distinction is that we can lawfully say 'we will sell you only so long as you observe such minimum retail prices' but cannot say 'we will sell you only if you agree to observe such minimum retail prices,' since except as permitted by Fair Trade legislations agreements as to resale price maintenance are invalid."

In other words, Parke Davis would make the test of illegality of a price-fixing agreement whether the parties use the word "agree."

tailers and wholesalers. Of course, an illegal agreement "between the seller and purchaser to maintain resale prices" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721) need not be express; it may be "implied from a course of dealing or other circumstances" (*United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99; *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210).

The short of the matter is that Parke Davis' entire "course of dealing" (*Schrader* case, *supra*) in seeking to eliminate retail price-cutting in the District of Columbia went far beyond the exercise of a manufacturer's right "to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell * * *" (*Federal Trade Commission* v. *Beech-Nut Co.*, 257 U.S. 441, 451). For the uncontradicted evidence in this record shows a concerted effort by Parke Davis, in conjunction with its retailers and wholesalers, to fix the retail prices of its products and, when that proved unsatisfactory, to minimize the price competition by eliminating cut-price advertising. In so doing, it extracted agreements and understandings from reluctant retailers as a result of threatened or actual boycotts, in which it forced its wholesalers to join. In the light of these facts, we submit that there is no basis in the record for the district court's conclusion that Parke Davis did not enter into any agreements with the retailers or ~~manufacturers~~. On the contrary, the record here clearly shows a price-fixing

conspiracy and combination in violation of the Sherman Act.

B. THE WHOLESALE PRICE MAINTENANCE SCHEME[25]

The district court further erred, we believe, in holding that Parke Davis' continuing actions to maintain its "suggested" wholesale resale prices in the District of Columbia amounted to no more than a seller's unilateral selection of customers which is permissible under the *Colgate* doctrine. Here, too, as in the case of the retail price maintenance plan, the basic facts are undisputed; the question is what inferences are to be drawn from such facts.

Parke Davis distributes its products in the District directly to retailers, and indirectly through independent wholesale drug dealers.[26] Parke Davis and the wholesalers sell directly to many of the same retailers and are in direct competition for their business

[25] Appellee contends (Motion to Affirm, p. 3, n. 1) that since the statement of questions in the Government's notice of appeal and jurisdictional statement do not refer to the maintenance of wholesale prices, this question is "not before this Court." In its Jurisdictional Statement, however, the Government specifically reserved the right to argue the point (Juris. St., note 16, p. 17).

[26] The wholesalers uniformly testified that Parke Davis was in competition with them (R. 134, 142, 162–163, 188, 189, 196), one stating Parke Davis was its "biggest competitor" in the sale of its products to retailers (R. 192–193). A Parke Davis witness conceded that it sells "to the same retail customers [as its] wholesaler-distributor" and that "[t]o some extent" it "competes price-wise with [its] wholesalers" (R. 252–253; see also R. 224). In the Washington area in 1956, Parke Davis sold $199,304 worth of products directly to retailers and $161,247 to wholesalers (Fdg. 2, R. 31).

(R. 132, 134–135, 142, 162–163, 188, 189, 192–193, 199, 224, 252–253).[27]

Parke Davis has the "continuing policy" that it will sell only to wholesalers who will observe the "Net Price selling schedule" in its wholesale price list (R. 310B; see R. 249). The wholesalers who handle Parke Davis' products uniformly followed these "suggested" resale wholesale prices (R. 130–131, 136, 188, 196). Furthermore, the wholesalers are not "permitted" (R. 196, 224) to make available to their customers the substantial quantity discounts which Parke Davis offers to retailers dealing directly with it (R. 95–96, 142, 163, 189, 196). The result is that although, as Parke Davis officials admitted, the independent wholesalers "can offer much better service" (R. 224)[28] and "render a variety of services that Parke Davis does not render" (R. 271), the wholesalers sell far smaller percentages of Parke Davis products to the retail druggists than of most other drug lines which they carry (R. 142–143).

The record is clear that the wholesalers follow Parke Davis' "suggested" resale prices, not because they adopted such prices in the exercise of their own

[27] Prior to 1947, Parke Davis sold to wholesalers at the same price it sold to retailers (R. 235–236). However, it changed this to provide wholesale discounts so that retailers purchasing "in small quantities" or at times not convenient for Parke Davis could secure Parke Davis products from the wholesalers (who, unlike Parke Davis, render these special services, R. 271) and still make the standard markup on such products (R. 236).

[28] The Parke Davis official testified that the wholesaler "can sell a dozen or a twelfth of a dozen" and "is in [the retailer's] store once or twice a week, he calls them every day on the phone, and we cannot service customers that well" (R. 224).

business judgment, but because Parke Davis requires them to do so and they know that, if they fail to conform, Parke Davis will cut them off (R. 162, 189, 190, 249, 271–272). Since Parke Davis products are widely distributed and in demand, an individual wholesaler who is cut off obviously would be under a serious competitive disadvantage vis-à-vis the other wholesalers in the area who continue to obtain these important items.

In the circumstances, we do not believe that Parke Davis can justify its maintenance of wholesale prices as involving no more than a seller's right to refuse "to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721). For "[a] distributor of a trade-marked article may not lawfully limit by agreement, *express or implied,* the price at which * * * its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings [and McGuire] Act[s]" (*ibid.*, emphasis added). In the instant case, Parke Davis has "limit[ed] by [implied] agreement * * * the price at which * * * its [wholesale] purchaser may resell" its products in a non-"fair trade" area.

The record shows that Parke Davis was not merely selecting the particular customers with which it will deal. There is nothing in this record which shows any selection of wholesale customers by Parke Davis in the Washington area. On the contrary, Parke Davis requires all of its wholesale customers, even those in non-"fair trade" areas, upon pain of being cut off, to adhere to the resale prices which it pre-

scribes. Moreover, this requirement obviously is designed to insure that the wholesalers will not compete with it pricewise. For although Parke Davis concedes that the wholesalers can render better service to many of the retailers than it can, it refuses to permit the wholesalers to allow the retailers the quantity discounts which Parke Davis alone may give.

Parke Davis' action in policing the allowance of a cash discount by one of its wholesalers refutes its contention that it did no more here than engage in "permissible selection of customers under the decision in *Colgate & Co.* * * *". *Bausch & Lomb* case, *supra*, p. 729. One of the wholesalers had a policy of giving retailers an annual deferred discount. Parke Davis first advised him that he would have to eliminate this discount, but could give his customers a 2% cash discount. However, Parke Davis subsequently advised him that this cash discount would also have to be eliminated because, although most customers had prepaid their purchases with the wholesaler through cash deposits, the wholesaler "did not in each instance, before [it] took off the cash discount from [its] invoice, examine the state of the account of the particular customer * * * [to see] if there was, in fact, cash available" (R. 191, see R. 186–192, 268–271).[39] The Parke Davis area manager, who had

[39] While there is some indication that the district court may have granted a motion to strike the testimony of the wholesaler dealing with this incident (R. 186–193), it appears that it probably did not. See R. 193, 266–267. In any event, the court subsequently permitted a Parke Davis official to give substantially the same evidence (R. 267–271). While the evi

required the wholesaler to stop the cash discount, testified that he had told the wholesaler that this method of giving the discount was objectionable because it "gave the Washington Wholesale Drug Exchange a competitive advantage over Parke Davis" (R. 269; R. 270). It is difficult to understand what possible interest Parke Davis could have in whether, at the time the cash discount was given, the particular retailer had sufficient cash on deposit to cover the order, except for the fact that Parke Davis was in competition with the wholesaler and the giving of such discount would give the latter "a competitive advantage" over it.

Since Parke Davis and its wholesalers directly compete with each other in the sale of Parke Davis products to the retailers, express resale price maintenance agreements between Parke Davis and the wholesalers would be illegal. *United States* v. *McKesson and Robbins,* 351 U.S. 305. Price fixing, however, is equally illegal whether it "is accomplished by express contract or by some more subtle means * * *" (*id.*, p. 310). Where, as here, a manufacturer is in direct competition with its wholesalers in selling to retailers, we submit that understandings and implied agreements between it and the wholesalers under which the latter, on pain of being cut off, undertake to follow the manufacturer's "suggested" resale prices, constitute an illegal price-

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dence related to events prior to the date specified in the complaint as the beginning of the conspiracy (July 1956, R. 4), it was admissible as showing the background of the conspiracy. Cf. *United States* v. *Valenti*, 134 F. 2d 362, 365 (C.A. 2); *United States* v. *General Motors Corporation*, 121 F. 2d 376, 407-408 (C.A. 7), certiorari denied, 314 U.S. 618.

fixing agreement which violates Section 1 of the Sherman Act.[29a] For the effect of Parke Davis' wholesale price maintenance plan is that "competition among * * * [wholesale] distributors is practically suppressed; for all who would deal in the company's products are constrained to sell at the suggested prices." *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455. In terms of its actual effect upon competition, the result is no different than if Parke Davis had entered into express "fair trade" agreements with its wholesalers. Such agreements, however, would be illegal in the non-"fair trade" areas here involved. The decision below, therefore, permits Parke Davis to do indirectly, through its control over the source of supply, what it could not do directly.

II

THE COURT BELOW ERRED IN HOLDING, AS AN ALTERNATIVE GROUND FOR DISMISSING THE COMPLAINT, THAT THE GOVERNMENT WAS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE THERE WAS "NO REASONABLE PROBABILITY" THAT PARKE DAVIS WOULD RESUME ITS ATTEMPTS TO FIX RESALE PRICES

The court below also erred, we believe, in holding, as an alternative ground for dismissing the complaint,

[29a] The recent decision of the Court of Appeals for the Fourth Circuit in *McElhenny Co.* v. *Western Auto Supply Co.* (No. 7813, decided July 16, 1959) is not to the contrary. There the court upheld the district court's dismissal of a private antitrust complaint charging that a manufacturer's threats to stop selling to retail outlets who handled products of competing manufacturers, and its ultimate carrying out of such threats, violated, *inter alia*, Section 3 of the Clayton Act. The court pointed out that Section 3 does not "prohibit a unilateral refusal to sell," but only agreements not to handle a competitor's products (Slip op., p. 7); and it recognized that "the course of dealing between seller and buyer

that the Government was not entitled to injunctive relief because there was "no reasonable probability" that Parke Davis would resume its attempts to fix resale prices (R. 30). While a court of equity has "broad" discretion to determine whether "relief is needed," there must be a "reasonable basis for the District Judge's decision" that relief is unnecessary. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 634. We submit that there is "no reasonable basis" (*Grant, supra*, p. 634) for the district court's conclusion that there is "no reasonable probability" that Parke Davis may resume its unlawful price-fixing activities.[30]

1. The district court gave three reasons for its ruling. (1) "[I]n the fall of 1956, [Parke Davis] abandoned in good faith its efforts to maintain mini-

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may * * * go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding" (p. 6). But it ruled (p. 9) that the complaint was insufficient to charge a violation of Section 3 because it lacked a "clear cut allegation" that there was any "agreement or understanding" between the manufacturer and retailers that the latter would not handle competing products. However, the court remanded the case to the district court to permit the plaintiffs to amend their complaint to allege that the exclusive dealing was the result of a "condition, agreement or understanding."

The decision, therefore, holds only that the plaintiffs failed properly to charge a violation of Section 3 of the Clayton Act because of the absence of any "clear cut allegation" that the exclusive dealing rested on agreements, expressed or implied. In the instant case, however, the record establishes that there were implied price-fixing agreements between Parke Davis and its resale and wholesale outlets.

[30] Obviously, the case is not "moot" in the sense that cessation of the challenged practices "deprive[s] the tribunal of power to hear and determine the case * * *." *Grant* case *supra*, p. 632.

mum resale prices in the involved territory"; (2) "the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field"; and (3) "under the long-continuing competitive conditions, neither defendant nor other manufacturer or distributor of like goods could possibly attempt to do so" other than with "heavy financial loss" (R. 30). None of these reasons has any support in the record.

The only evidence showing the reasons for abandonment of Parke Davis' attempts to enforce retail "fair trade" prices in the District of Columbia and Virginia[31] is the testimony of Parke Davis' assistant general attorney that "one of the reasons" therefor was the Government's antitrust investigation (R. 174–175). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of * * * reform, especially when abandonment seems timed to anticipate suit * * *." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333; see,

[31] The record shows that Parke Davis' 1956 endeavors to enforce retail price maintenance in the Washington area were in implementation of a national policy of the company to enforce "fair trade" prices on its products even in non-"fair trade" areas (R. 251–252, 274–275, 277–279, 315; cf. R. 31, 40–41, 236). While there was testimony that this national policy had been abandoned (R. 174), there is no evidence with respect to any economic conditions that may have led to its abandonment. Of course, the mere abandonment of illegal practices is not itself a sufficient ground for denying injunctive relief.

The relief requested in the Government's complaint was not limited to the Washington area (R. 7–8). Upon a finding of violation, a court may, and sometimes must, grant relief which goes beyond the particular violation shown. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435, 436; *United States* v. *United States Gypsum Co.*, 340 U.S.

also, *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 310 (C.A. 7); cf. *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 42–43.

The only evidence relating to "business and economic conditions in its field" is the testimony that since the year 1955 Parke Davis' "sales volume has gone up generally" (R. 275). The statement by a Parke Davis official that the price situation in the District had "blown up again" in November 1956 when cut price advertising was resumed (R. 263, 314), and the fact that thereafter the retailers were able to obtain Parke Davis products despite their cut-rate advertising and selling (R. 81–82, 110, 122, 160), certainly does not establish the "economic conditions" conjectured by the court. Obviously, a defendant who admittedly abandoned its practices because of the Government's antitrust proceedings would not resume them during the pendency thereof.

Finally, there is no evidence of any nature concerning the "long continuing competitive conditions" or supporting the assertion that neither Parke Davis nor any other drug manufacturer or distributor could attempt a new boycott of price cutters except at a "heavy financial loss." There is not even any evidence that Parke Davis sustained any financial loss as a result of its 1956 efforts.

2. There is nothing in the record which indicates

76, 90. In the circumstances, we believe that, before the district court properly could conclude that no relief at all was necessary, it was required to consider whether, even assuming *arguendo* that no relief was necessary in the Washington area, relief might not still be required with respect to carrying out the company's national policy.

that Parke Davis has ever abandoned its conspiracy with the wholesalers under which the latter "adhere to resale prices fixed by" it (R. 5). See *supra*, pp. 36–41. Since this agreement was specifically alleged in the complaint to be one of the terms of the conspiracy, the district court plainly erred in holding that there was no need for relief with respect to it.

3. Unlike the interlocking directorates in *Grant*, any resumption of which could be easily detected, the price-fixing schemes here involved subtle and implied agreements and understandings which are necessarily difficult to uncover. In this situation, we submit that the Government establishes a prima facie case for relief upon showing that the defendant has committed the violations charged, and that the defendant then has the burden of coming forward to show that special circumstances exist which make relief unnecessary in the particular case. "A trial court upon a finding of conspiracy in restraint of trade * * * has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88; see, also, *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401.

Since it was Parke Davis which raised the issue that there was no need for relief (as one ground for its motion to dismiss at the close of the Government's case, R. 279, 281), it was incumbent upon it to show that there is "no reasonable expectation that the wrong will be repeated" (*United States* v. *Alumi-*

num Company of America, 148 F. 2d 416, 448 (C.A. 2)).[32] In the case of interlocking directorates, termination of the interlocks, accompanied by a disclaimer of "any intention to revive" them (*Grant* case, *supra*, p. 633), may then shift the burden to the Government to "satisfy the court that relief is needed" (*ibid.*). Here, however, where the problems of detecting resumption are far more difficult, Parke Davis did not even disclaim any intention to resume its price-fixing attempts, much less attempt to show that, because of economic or other conditions, relief is unnecessary. On the contrary, it relied solely on the fact of abandonment—an abandonment which, concededly, took place only after the Government had instituted its investigation into the legality of the practices and partly as a result thereof. Contrary to the district court's conclusion (Fdg. 27, R. 38), that fact is not enough to shift the burden to the Government to submit "proof" of Parke Davis' "intention * * * to resume such [price fixing] efforts." Indeed, in a case

[32] In that case, the defendant was found to have maintained, prior to 1933, such a narrow margin between its price for ingot and its price for rolled sheets as to effect a price "squeeze" upon competitors engaged in making rolled sheets from ingot purchased from the defendant. 148 F. 2d at pp. 437–438. By its decision rendered in 1945, the Court of Appeals directed the district court to enjoin such a price squeeze, discontinued twelve years earlier. *Id.*, at p. 447. The court said (*ibid.*):

"* * * It is enough here to say that, since 'Alcoa' abandoned the 'squeeze' only after it became aware that it was under investigation, it is in no position now to complain of whatever stigma there may be in an injunction; in such a setting there is no place for sensibilities: nor should lapse of time secure immunity * * *."

of this kind the evidence of unlikelihood or impossibility of resumption is peculiarly within the knowledge of the defendant, and it is the defendant which must come forward with such evidence.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959

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SUPREME COURT, U.S.

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No. 70

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*,

v.

PARKE, DAVIS & COMPANY, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945 (1928) 53

Supreme Court of the United States

OCTOBER TERM, 1959

No. 20

UNITED STATES OF AMERICA, *Appellant*,

v.

PARKE, DAVIS & COMPANY, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

OPINION BELOW

The opinion, findings of fact and conclusions of law of the United States District Court for the District of Columbia (R. 28) dated July 16, 1958 dismissing the Government's Complaint (R. 1) at the conclusion of the Government's proof are reported in 164 F. Supp. 827.

JURISDICTION

The jurisdiction of this Court is as stated in the Government's brief.

QUESTIONS PRESENTED

The parties are agreed that under the rule in *United States* v. *Colgate & Co.*, 250 U.S. 300, which is not challenged here, Parke, Davis & Company can unilaterally select its customers by refusing to sell to those customers with whom it does not wish to deal. Certain refusals to sell to particular customers are challenged by the Complaint. The District Court found that Parke, Davis did no more than refuse to sell, that its conduct was unilateral not conspiratorial and that the *Colgate* rule applied. The central issue in this case is whether the findings of the District Court should be set aside. In determining this issue the following questions are presented:

(1) Should this Court re-examine findings of fact made by the court below where the appellant seeks a trial *de novo* on the entire record and makes no attempt to show that such findings are "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure?

(2) Are the findings, which are based primarily on the evaluation of contradictory oral testimony, "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure?

(3) Does the record support the District Court's determination that Parke, Davis made no express or implied agreement with any of its customers but merely exercised its right unilaterally to select customers by refusing to sell?

(4) Was there a reasonable basis for the District Court's alternative holding that injunctive relief was neither necessary nor appropriate under the facts of the case?

STATUTES INVOLVED

In addition to the provisions of the Sherman Act, cited in the Government's brief, Rule 52(a) of the Federal Rules of Civil Procedure is pertinent.

Rule 52(a) of the Federal Rules of Civil Procedure reads, in part, as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT

Introduction

This case concerns certain dealings between Parke, Davis and some of its customers in the cities of Washington, D. C. and Richmond, Virginia during a period of a few months in 1956. No other drug manufacturers are involved and no issue of monopoly is presented.

Cut-rate resale prices and advertising policies of certain drugstores in these cities had jeopardized Parke, Davis' good will and business relationship with its many other customers in these areas. Parke, Davis announced a policy of refusing to sell to retailers who cut prices on its products, as well as to wholesalers who sold to such retailers. This effort to protect its business interests was not successful and was abandoned after a short time.

The Government attacked this Parke, Davis sales policy by bringing simultaneous criminal and civil actions in the United States District Court for the District of Columbia, charging a conspiracy to fix prices in violation of Sections 1 and 3 of the Sherman Act.

The criminal case was tried first. At the close of the Government's evidence, the District Court granted a motion for acquittal. *United States* v. *Parke, Davis & Co.*, 1957 CCH Trade Cases, para. 68,856 (D.D.C. Cr. No. 444-57). Thereafter, in June 1958, the companion civil proceeding, which is the subject of the present appeal, came on for trial before a different judge of the same court. The Government voluntarily dismissed the second cause of action, and only the first cause of action was tried. Seventeen witnesses, including three Parke, Davis representatives, were called as witnesses by the Government. At the close of the Government's evidence, the District Court granted a motion by Parke, Davis under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the complaint on the ground that upon the facts and the law the Government had failed to show any right to relief.

Detailed findings of fact were made covering all phases of the case. The Government now asks this Court to reverse these findings and to accept its version of the facts although two district judges, after hearing the Government's evidence and seeing the witnesses, have refused to do just this.

That Parke, Davis had a right to select customers by refusing to sell is not challenged. The sole issue is accordingly an issue of fact: namely, whether Parke, Davis acted unilaterally as the District Court found it had done, or whether its course of conduct was such that the District Court erred in not finding an implied agreement to fix prices.

As the following summary of the principal facts makes clear, the record amply supports the findings of the District Court that Parke, Davis limited its conduct to unilateral refusals to sell and made no express or

implied agreement with any of its retail or wholesale customers to fix prices.

Background Facts Concerning the Sale of Parke, Davis Products

Parke, Davis is a manufacturer of pharmaceutical products. It competes with hundreds of other manufacturers of these products (Fdg 4, R. 31; R. 140), and competition is intense (Fdg 4, R. 31; R. 273, 275). In the District of Columbia and in Richmond, Virginia, the only areas involved in this case, Parke, Davis sales account for less than 5 per cent of the total sales of pharmaceutical products (Fdg 3, R. 31; R. 271). There has been no claim or proof that the prices of Parke, Davis' 600-odd products are not competitive with the prices of the thousands of other products in the field (Fdg 4, R. 31; Plaintiff's Answer dated January 3, 1958 to Defendant's Interrogatory 6(1)(a)), or that any of the manufacturers with which Parke, Davi competes was in any way involved or affected by the actions challenged here. Indeed, at all pertinent times there was continuous price cutting and advertising of price cuts on products competitive with those of Parke, Davis (Gt. Ex. 2, R. 76, 303-05; R. 223, 245, 275).

Parke, Davis sells its products to retail drugstores both directly and to some extent indirectly through wholesalers; the retailers in turn resell the products to members of the consuming public (Fdgs 5, 1, R. 31-32; Complaint and Answer, para. 8, R. 3, 10). In the Washington area, approximately three-quarters of its sales in 1956 were to retailers, the remainder to wholesalers (Fdg 2, R. 31; R. 182). Retailers' large volume purchases are usually made directly from Parke, Davis, in order to take advantage of quantity

discount prices (R. 59, 79-81, 99, 111-12, 132, 151, 203). The wholesalers, on the other hand, provide such retailers with the convenience of small quantity ("fill-in") purchases, speedy delivery, daily calls, and similar services (Fdg 5, R. 31-32; R. 99, 141, 224, 271).[1]

Parke, Davis unilaterally establishes suggested prices at which its products should be resold by retailers to the public (Fdgs 7-9, R. 32; 6, Ex. 1, R. 57, 301). The suggested retail resale prices are enforced by fair trade agreements in states that have fair trade laws, and are suggested for use in states that do not (Fdg 8, R. 32; 6, Ex. 1, R. 57, 301). The price maintenance policy would not, of course, affect the amount which Parke, Davis received for its goods from wholesalers or retailers (R. 272).

In the spring of 1956, Parke, Davis had a policy of refusing to sell to retailers in non-fair trade areas who did not observe its suggested resale prices, and of refusing to sell to wholesalers who sold to such retailers (Fdg 11, R. 33; R. 169-70, 220, 236, 249-50). This policy was in line with a long-standing Parke, Davis policy of refusing to sell its products to concerns which the Company for one reason or another did not consider desirable customers (R. 236-37).

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[1] The prices at which Parke, Davis sells its products to wholesalers are at such a level as to permit the latter to resell to retailers at the same standard prices as Parke, Davis offers, thus assuring the retailer who does not qualify for quantity prices the same retail markup whether he buys from Parke, Davis or from the wholesalers (R. 235-36, 252; *cf.* R. 41). Before 1947, when Parke, Davis instituted its present distribution setup, Parke, Davis sold its products to wholesalers and retailers at the same prices, with the result that the wholesalers were compelled to charge higher prices on resale than the retailers could obtain by dealing directly with Parke, Davis (R. 235-36).

Parke, Davis had no regularized or systematic machinery for enforcing its policy as to suggested resale prices; it depended wholly upon information that its salesmen might obtain as to price cutting in the course of their ordinary sales activities. It did not, for instance, regularly shop stores or maintain card index files of offenders; and there is no evidence that it sought the cooperation of either retailers or wholesalers in reporting or policing the prices at which its goods were sold (Fdg 10, R. 32-33; R. 239).

Parke, Davis also has for many years unilaterally set resale prices which it has recommended for use by wholesalers (Fdg 7, R. 32; R. 130-31, 139, 162). These prices have long been published to the trade in Parke, Davis' wholesale catalogue, along with a statement that "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe" those prices (G. Ex. 13, R. 135, 310A-1013; R. 162, 169-70). The wholesalers customarily follow the recommended resale prices (Fdg 28, R. 38; R. 136, 184, 188, 190, 196).

Origin of the Refusals to Sell

In 1956, neither the District of Columbia nor the State of Virginia had a fair trade law in effect (Fdg 6, R. 32; R. 227).[2] Before the summer of that year, however, Parke, Davis' policy regarding suggested retail prices was not being applied in the District of Columbia or in Richmond, Virginia. Although there was some price cutting in Parke, Davis products (Fdg 12, R. 33; R. 221, 251), this condition was not sufficiently prev-

[2] Virginia has since reinstituted such a law. See Va. Code §§ 59-8.1 to 59-8.9 (1958 Supp.).

alent to cause concern to the Parke, Davis branch manager in Baltimore who was responsible for sales in these cities (Fdg 12, R. 33; R. 222-23). The branch manager, having recently been transferred into the area from a region where fair trade laws were in effect, was in fact not even aware that Parke, Davis had a policy of attempting to obtain observance of its resale prices in non-fair trade areas by refusals to sell (Fdg 12, R. 33; R. 249, 252, 279).

In the spring of 1956, advertising of deep price cuts on some of Parke, Davis' products by one retailer in the District of Columbia, Dart Drug Company, had become a matter of concern (Fdg 12, R. 33; R. 223). The prices Dart Drug was advertising on certain of these Parke, Davis products—principally certain vitamins—were below those at which small retailers could purchase the same products from Parke, Davis (Fdg 16, R. 34; R. 91-92). One of the purposes of such advertising was to attract customers who, though they requested Parke, Davis products, might be induced to buy other brands on which the advertising retailer could make a bigger profit (Fdg 16, R. 94-95, 237-38). The effect of such advertising was to injure the good name and marketability of Parke, Davis' products. The Company's experience made it clear that many of the retailers upon whom Parke, Davis relied for the promotion of its goods, being unable to meet the prices so advertised, would lose interest in the promotion and sale of Parke, Davis' goods and simply turn to products of other manufacturers (Fdg 16, R. 34; R. 237-38, 272-73).

Parke, Davis' branch manager, therefore, sought guidance at a sales meeting at Parke, Davis' headquarters in Detroit, where he was informed of the Com-

pany's policy of refusing to sell to price cutters in non-fair trade areas (Fdg 12, R. 33; R. 250-52). The Company's president stated that this policy was based upon the advice of counsel that the Company had "the right to select our own customers and refuse to sell to those we choose" (R. 252). This advice, based upon the *Colgate* decision[3] (R. 177-78), had been expressed by Parke, Davis' assistant general attorney in the following manner (G. Ex. 16, R. 178-80, 312):[4]

> "The gist of the matter, as briefly as I can state it, is that it is an actionable restraint of trade (except as such agreements are sanctioned by state Fair Trade Laws) to reach an agreement that a customer will observe resale prices. However, it is the right of a trader to adopt and follow a business policy of selling to those customers only who in fact do observe announced resale pricing policies.
>
> "In short, we may enforce an adopted policy arrived at unilaterally by which we announce that we will sell only to those outlets who observe the minimum retail prices set forth in our catalogue or supplements thereto."

Parke, Davis' branch manager thereupon put the Company's policy into effect by instructing his assistants and Parke, Davis' salesmen to inform the trade in the District of Columbia and Virginia that it was Parke, Davis' policy not to sell to retailers who sold its products below the suggested prices, and not to sell

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[3] United States v. Colgate & Co., 250 U.S. 300.

[4] The Government's trial attorney in this case acknowledged to Parke, Davis' assistant general attorney that his interpretation of the Colgate case was correct (R. 176).

to any wholesaler who in turn sold those products to such a retailer (Fdg 12, R. 33; R. 253). The Company's representatives were neither instructed nor authorized to seek agreements on this subject from either retailers or wholesalers, but were merely instructed to state the policy regarding retail prices and its consequences (Fdg 12, R. 33; R. 271-72).[3]

The Refusals to Sell

Pursuant to these instructions, Parke, Davis' salesmen and field managers did, in July 1956, announce the policy to both retailers and wholesalers in the District

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[3] The following testimony, by Parke, Davis' branch manager, who was called as a Government witness, is uncontradicted (R. 271-72):

"Q. When you talked to your salesmen, you were asked about your discussion with Mr. Cummings and Mr. Powers, did you authorize any of them to go out and make agreements with any of your customers about prices?

"A. No, we didn't seek agreements at any time, nor did I ask our men to seek agreements. I told them to state the policy and the consequences.

"Q. The policy was that the wholesalers could not sell to price-cutting retailers?

"A. That's correct.

"Q. Or they would be cut off?

"A. That's correct.

* * * *

"Q. And you would not sell to any retailer who sold below your suggested minimum prices?

"A. That's correct.

"Q. And you authorized no one to enter into an agreement?

"A. I wouldn't have the power to authorize anyone to make such an agreement.

"Q. Did you give them any such authorization?

"A. No."

of Columbia and in Richmond (Fdg 12, R. 33; R. 253-54, 274). Separate, individual calls were made on retailers and wholesalers. There were no joint meetings, joint requests or joint action (Fdg 31, R. 39). The terms in which the policy was stated to the trade were recorded in a memorandum written by the Government's principal witness and the principal price-cutting retailer. This memorandum was written during the actual course of the visit at which he was informed of the policy by Parke, Davis' field manager (G. Ex. 6, R. 98, 308):

> "That any direct account of Parke, Davis whether it be in Md., Virginia or D. C. which does not abide by minimum retail prices as listed in their catalog will be cut off from direct buying. Furthermore any wholesaler who sells a retail store below minimum retail prices as listed in our catalog will be cut off from direct buying. . . ."

Of the 260 or 270 retail drugstores in the District of Columbia (R. 239), only 7 organizations were shown to be involved in any way in this effort by Parke, Davis to enforce its resale price policy.[6] One of these was a cooperative buying and advertising organization of some 30 independent retailers, 22 of whom were in the District of Columbia (R. 146; G. Ex. 22, R. 264, 314B). Upon being informed of Parke, Davis' policy, this group ceased its occasional cooperative advertising of cut prices on Parke, Davis products, although the organization left its member stores entirely free to sell those products, or even advertise them individually.

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[6] Out of the 100 or so retailers in Richmond only one, Standard Drug, was involved (R. 239).

at whatever prices they wished (Fdg 22, R. 36; R. 106, 112-13, 148; Stipulation, R. 26). Upon being informed of Parke, Davis' policy, a representative of one other retailer stated that it would cease cutting prices on Parke, Davis products (Fdg 19, R. 35; R. 226-27, 241), although it is not clear that this retailer did, in fact, stop such cutting (*cf.* R. 255-56).

Despite the announcement of Parke, Davis' policy, however, five other retailers continued to sell Parke, Davis products at cut prices (Fdgs 20, 21, 23, 24, R. 35-37; R. 61-62, 102, 118-19; 151-53, 254). Parke, Davis thereupon ceased to sell its products to those five retailers, and notified five wholesalers serving the District of Columbia and Virginia, making clear to each of the wholesalers separately, that Parke, Davis had a policy of refusing to deal with wholesalers who sold its products to such retailers. (Fdgs 13, 14, R. 33-34; R. 137, 157, 163-64, 205, 223). As a result of the statement of Parke, Davis' policy, three wholesalers which had been making sales of Parke, Davis products in small amounts to the retailers in question attempted, without complete success, to stop such sales (Fdg 14, R. 34; R. 129-30, 138, 141, 151, 164-65, 202-03, 210-11). Despite these refusals to sell, however, the retailers concerned continued to offer Parke, Davis products for sale at cut prices (Fdg 15, R. 34; R. 89-90, 101-02, 110; G. Ex. 2, R. 76, 303-05).

Refusals to Sell Directed to Advertising

At the end of August, 1956, after about six weeks of these unsuccessful attempts to make the policy effective with regard to suggested retail prices, Parke, Davis was forced to recognize that price cutting would continue (*cf.* R. 234, 265). The Company's branch man-

ager informed some of the five retailers in question that Parke, Davis would sell to them regardless of the prices at which they resold Company products in their stores, and would thereafter refuse to supply them only if they advertised cut prices on such products in the newspapers or by window signs (Fdg 17, R. 35; R. 83, 109-10, 119-20, 154, 232-34, 260-61). Thereafter, one of the retailers ceased its newspaper advertising of cut prices on Parke, Davis products (Fdg 23, R. 36-37; R. 74-75) and two others took down window signs mentioning cut prices on Parke, Davis products (R. 110, 120). It does not appear that the other retailers took any action in response to the Company's statement of its position (*cf.* Fdgs 20, 21, R. 35-36). Parke, Davis then resumed selling its products to all five retailers (Fdg 17, R. 35; R. 110, 234-35); and informed the wholesalers that it no longer had any objection to their selling the Company's products to the retailers in question (R. 130, 138, 167, 201, 209, 261).

For a period of a month thereafter, there was no cut-price advertising on Parke, Davis products in the District of Columbia, at least in the newspapers (Fdg 17, R. 35; G. Ex. 10, R. 109, 309; R. 83-84); the retailers, however, continued to sell Parke, Davis products at cut prices (Fdg 17, R. 35; R. 83, 110, 120, 160, 273-74). The advertising of price cuts on Parke, Davis products which was the object of Parke, Davis' concern involved no more than ten or a dozen of Parke, Davis products (R. 89-96; Ex. 4, R. 78, 307; G. Ex. 2, R. 76, 303-05; R. 117-18; *cf.* R. 111). No evidence was introduced to show that the brief discontinuance of this advertising by the few retailers in question had any effect on the prices at which Parke, Davis products were in fact sold to the public (Fdg 25, R. 37).

Refusals Discontinued as Ineffective

Vigorous cut-price advertising on Parke, Davis products broke out again in November, 1956 (R. 75, 82-83), and has continued ever since (Fdg 27, R. 37-38; R. 82-83, 110-11, 122, 169-61). Price cutting continued at all times.

Parke, Davis made no further effort to discourage price cutting or cut-price advertising on its products (Fdg 18, R. 35; R. 75-76, 110-11, 122); in fact, it abandoned any attempt to maintain retail prices in the areas in question, its efforts in this direction through the exercise of its right to choose its customers having proven wholly unsuccessful (Fdg 27, R. 37-38; R. 173-75).

The Decision of the District Court

The District Court, after hearing the witnesses and considering all the evidence presented by the Government, held that the Government had failed to prove the existence of the conspiracy as alleged in the Complaint (R. 30), and granted Parke, Davis' motion to dismiss at the close of the Government's evidence. In its opinion, the court stated that Parke, Davis had "well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell" (R. 29); that Parke, Davis' representatives "notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy" (R. 29); that the representatives "likewise contacted wholesalers, notifying them of its policy and the whole-

salers were likewise free to refuse to comply and thus risk being cut off by the defendant" (R. 29); that "both wholesalers and retailers valued defendant's business so highly that they acceded to its policy" (R. 29); and that "there was no coercion by defendant and no agreement with co-conspirators" (R. 30).

Moreover, the District Court entered detailed specific findings as to each aspect of the alleged conspiracy and each alleged co-conspirator, finding in each instance that the proof failed to support the critical allegations of agreement, understanding and concert of action, but instead showed merely unilateral action by Parke, Davis, and unilateral response thereto by the retailers and wholesalers concerned.

Upon the basis of these findings, the District Court concluded that Parke, Davis' "actions . . . were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U.S. v. Colgate & Company*, 250 U.S. 300." (R. 30).

SUMMARY OF ARGUMENT

The detailed findings of the District Court show that Parke, Davis made a brief and wholly unsuccessful attempt to maintain minimum resale prices in Washington, D. C. and Richmond, Virginia by the unilateral exercise of its right to refuse to sell. The Government acknowledges that Parke, Davis had such a right under *United States v. Colgate & Co.*, 250 U.S. 300. Accordingly, to succeed here, the Government must establish that the findings of fact below are in error, for the findings negate the claim that anything more than unilateral action was involved in Parke, Davis' dealings with its customers.

I

In spite of the clear directions of this Court that antitrust cases should not be brought before it for what amounts to a trial *de novo* on the record below, the Government here seeks just such a trial. No issue is raised as to the applicable law. The Government seeks only to have the Court apply that law to a version of the facts wholly at variance with the specific findings of the court below. It tenders the record as a whole to this Court without specifying any particular finding or findings which are challenged as clearly erroneous. This places an undue and improper burden on the Court, is contrary to the practice of this Court, and inconsistent with the sound administration of justice. There being no controversy as to the applicable law and no specific attack on any finding, the judgment below should be affirmed.

II

Should the Court, nonetheless, embark on a re-examination of the facts, its review is governed by Rule 52(a) of the Federal Rules of Civil Procedure. The findings must be shown to be "clearly erroneous," under that Rule, before they can be set aside. In this instance, the findings were made by the District Court on the basis of a record consisting primarily of oral testimony, frequently contradictory in nature. Testimony of witnesses on direct was substantially altered on cross-examination. Testimony of witnesses conflicted in important particulars, raising issues of credibility. The District Court resolved these conflicts, as it must, and embodied its view of the evidence in specific findings of fact. A review of the evidence

as a whole discloses that there is ample support for each of the findings. The Government's vague and generalized attack on the District Court's assessment of the evidence completely fails to meet the "almost insurmountable burden" which Rule 52(a) imposes in a situation such as this. *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 252.

As analysis of the evidence will show, Parke, Davis was well aware of the limits of the *Colgate* doctrine and strictly adhered to it. None of its representatives were authorized to seek agreements and no agreements were solicited. The Company merely announced its policy individually but in equal terms to all retailers and wholesalers concerned. It consistently applied the policy to each retailer and wholesaler separately regardless of how other customers reacted. No steps were taken to implement the policy by policing procedures or eliciting the cooperation of others in the trade. Those who adhered to Parke, Davis' policy did so for their own business reasons and not because of any community of purpose or any assurance as to the conduct of others.

There was specific, affirmative evidence demonstrating, as to each of the alleged co-conspirators, that no agreement of any type was sought or obtained and that Parke, Davis merely announced the policy and carried it out in accordance with its terms. The fact that these efforts to obtain observance of minimum retail prices continued only over a limited period of time, involved only a few customers and were wholly abortive, in itself demonstrates the Company's strict adherence to the limits of that permissible conduct authorized by the *Colgate* case.

III

The effect of the *Colgate* case as applied in Sherman Act cases is clear. To be sure, the agreement or conspiracy proscribed by the Act may be implied from a course of dealing or other circumstances. It cannot be established, however, merely by a policy of refusals to sell, by the seller's announcement of such policy, or by the separate, individual recognition by customers of that policy.

When the courts have found a course of conduct such as to provide the basis for implying collusion, this has always occurred under factual circumstances far different from the facts presented here. This case is devoid of the monopolistic conduct, elaborate enforcement machinery, trade association activity or collaborative efforts invariably present in such cases. In the absence of any real basis for establishing a conspiracy, the Government seeks to upset the District Court's determination by attaching seductive labels to the unilateral acts of Parke, Davis and its customers which are necessarily involved in exercising the rights guaranteed under the *Colgate* decision. The fact that Parke, Davis announced its policy in advance creates no inference of impropriety, for its right to do so is expressly recognized in the *Colgate* case itself. Nor can any impropriety be inferred from the fact that the policy was applied to wholesalers as well as retailers. The wholesalers were also customers of Parke, Davis. The action of each was prompted solely by a desire to remain a customer and did not involve any community of purpose or joint action with each other or with Parke, Davis. The crux of the matter is that Parke, Davis merely stated its policy, applied it to all customers equally, and never made its actions as to one

customer dependent upon what another customer would do.

IV

Finally, the District Court was well within its discretion when it ruled as an alternative ground for dismissing the complaint that the Government was not entitled to injunctive relief even if an agreement to fix prices had been found by the court. Not only did the proof show that price cutting and advertising of cut prices continued in spite of Parke, Davis' efforts, but it was made quite apparent that when the policy proved ineffective it was wholly abandoned. No one familiar with the situation in the District of Columbia can have any doubt but that price cutting on pharmaceutical products, including those of Parke, Davis, has been rampant and widely advertised in that jurisdiction continuously since well before the institution of the present suit. There was a reasonable and adequate basis for this alternative holding of the court under the rule announced in *United States* v. *W. T. Grant Co.*, 345 U. S. 629.

ARGUMENT

I

THE GOVERNMENT IS NOT ENTITLED TO THE TRIAL DE NOVO IT SEEKS HERE.

The Government is, once again, asking this Court for a trial *de novo* on the record below in an antitrust proceeding. No issue is raised by the Government's papers as to the applicable law, which was clearly understood by the court below. Rather, the Government seeks to have this Court apply that law to a version of the facts wholly at variance with the specific

findings of the trial court. It tenders the record as a whole to this Court without anywhere in its papers specifying any particular finding or findings which are challenged as clearly erroneous.[7]

The Government is adopting the same practice here which it condemned only last term in a case where the findings of the court below were favorable to it.[8]

[7] The only instance where the Government explicitly challenges any factual determination of the District Court is at page 29 of its brief. There, the "finding" attacked is actually a statement from the trial court's opinion regarding the fact that each visit to a retailer or wholesaler was separate (R 29). No reference is made to the court's more comprehensive finding to the same effect on this point (Fdg 31; R 39).

[8] In International Boxing Club of New York, Inc., v. United States, 358 U.S. 242, the trial court had entered a judgment based on findings that the defendants had conspired to restrain and monopolize trade and commerce in the promotion of championship boxing contests. Upon appeal, the defendant largely ignored the detailed findings of the trial court and relied upon an independent evaluation of the evidence. The appellant's brief was described in the following terms by the Government:

> Although the issues to be considered on this appeal are those found by the district court, except a few clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure), appellants [sic] in their statement and argument, almost wholly ignore the court's findings of fact. They rely instead on fragmentary evidentiary items culled from the three-volume printed record, without discussing the relation of the cited evidence to the court's findings." Brief for Appellee, p. 5.

The Government took the position that such a presentation did not lay a proper foundation for reversal of the court below:

> Appellants, although asking this Court to reverse the findings of the district court that they had conspired to restrain and to monopolize trade and commerce in the promotion of cham-

There is not, however, one rule of law for the Government and a different rule for other litigants. As this Court forcefully asserted in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342, there is nothing which permits the Government, "even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record . . . ."

The District Court in this case made detailed, specific findings of fact. There are 31 numbered findings, which comprise nine pages of the record. While the Government clearly does not accept these findings, it is impossible to tell from its papers which findings are challenged. And yet a challenge to specific findings is essential if the Government is to obtain review, since there is no controversy as to the applicable law. If a particular finding or series of findings is to be attacked, the findings should be specified, so that the evidence pro and con relating to the challenged findings can be marshalled and the issue presented to this Court for decision on appeal.[9]

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pionship boxing contests, do not show or even attempt to show that the findings of combination and conspiracy lack evidentiary support and are 'clearly erroneous.' In effect, appellants are requesting this Court to try the case *de novo* on the record, to reject nearly all of the district court's findings, and to substitute its own contrary findings. In these circumstances, no foundation for reversal is laid. United States v. Yellow Cab Co., 338 U. S. 338, and cases cited *infra*, p. 23." Brief for Appellee, p. 19.

[9] The proper practice in an appellate court, when findings made under Rule 52(a) are challenged, is well stated in a recent opinion of the Court of Appeals for the Ninth Circuit:

> "An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous." Glens Falls In-

Rule 40(1)(g) of this Court requires that a brief exhibit clearly the points of fact and of law being presented. If the Government wishes to retry issues of fact before this Court, the least it should do is to point specifically to the findings of the court below which it considers erroneous and to recognize the burden placed upon it by Rule 52.

Here, while purporting to accept the findings below, and to present only so-called undisputed facts, the Government has in truth ignored many findings and much of the evidence. Its clever but incomplete selection of tidbits from the evidence distorts the effect of the record as a whole. This places a burden on the Court to appraise the entire record, and in effect retry the case without knowing in what particular or particulars the Government contends that the District Court was in error. The tender of the entire record for a trial *de novo* here is so clearly contrary to proper practice in this Court that the judgment below should be affirmed on this ground alone.

II

THE FINDINGS HAVE NOT BEEN SHOWN TO BE CLEARLY ERRONEOUS AND SHOULD NOT BE SET ASIDE.

A. THE Scope OF THE FEDERAL RULES OF CIVIL PROCEDURE PLACES A HEAVY AND SPECIFIC BURDEN ON THE GOVERNMENT WHEN IT SEEKS TO CHALLENGE THE FINDINGS BELOW.

The Government in its brief presents an interpretation of the facts which it has twice unsuccessfully urged upon district judges, first in the criminal case, and

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dennity Co. v. United States at the Relation of and to the Use of Westinghouse Electric Supply Co., 229 F.2d 370, 373 (9th Cir. 1955). See also Anderson v. Federal Cartridge Corp., 156 F.2d 681, 685 (8th Cir. 1946).

more specifically on the trial of this case below. Its request for findings to support this interpretation of the evidence was vigorously and repeatedly urged below but rejected by the District Court.[10] It nonetheless comes forward, without specification of any particular findings which it considers erroneous, and seeks to re-argue the entire case to this Court. It has a heavy and specific burden when it seeks to do this.

Rule 52(a) of the Federal Rules of Civil Procedure provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This Rule has long been recognized as applicable in this Court, and frequently applied in antitrust cases. Last term, in *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 252, the Court noted that the appellant had undertaken an "almost insurmountable burden" when it challenged the assessment of the evidence as a whole, since it was required to "show that the findings, or at least the basic ones, are clearly erroneous." The shoe should be on no different foot when the Government is the appellant.

The applicability of Rule 52 to cases such as this was

[10] See Plaintiff's request for findings of fact, filed June 26, 1958; Government's objections to defendant's proposed findings of fact, filed June 27, 1958; Motion by plaintiff for amendment of findings of fact and conclusions of law, filed July 18, 1958, denied July 22, 1958. These papers are included in the record filed in this Court, but are not printed. The stipulation as to printing provides that reference may be made to the unprinted record.

made clear in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-42:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

See also *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596-97; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-96:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-95. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

Rule 52 is particularly significant in this case because the Government relied almost entirely on oral

testimony to establish the alleged conspiracy. Only the trial court had the opportunity to judge the credibility of the witnesses, and credibility was an important issue because the evidence was contradictory on several crucial aspects of the case. The Government's chief witness, for instance, had an interest in the outcome of the litigation in view of a contemplated treble damage suit.[11] His testimony was contradicted by other witnesses and was inconsistent not only with his own testimony in this case and the companion criminal case, but also with a contemporary written memorandum which he had prepared.[12]

Moreover, another experienced trial judge heard and evaluated substantially the same evidence in the companion criminal suit. He reached the same conclusion as did the trial court here: that Parke, Davis had exercised only its right to act unilaterally in selecting its customers and that there was no agreement or conspiracy to fix prices.

As the next section of the brief will show, the findings of the court below are supported by "substantial evidence," see *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 117; *McAllister* v. *United States*, 348 U.S. 19, 23, and have not been shown to be "clearly erroneous." They must, therefore, be upheld.

B. EACH OF THE FINDINGS BELOW IS AMPLY SUPPORTED BY THE RECORD

If this Court undertakes a re-examination of the evidence as a whole, as the Government would have it do but is apparently hesitant to ask directly, the Court will find sustantial evidence supporting each of the

[11] See note 24 *infra*.

[12] See notes 15, 21-23 *infra*.

District Court's specific findings.[13] Since the Government has not indicated which findings, if any, it claims to be erroneous, we must necessarily consider the evidence as a whole.

While the nature of the offense charged is now discussed by the Government only in broad and general terms, it was explicitly and concretely defined by the Complaint and the Government's answers to interrogatories. Specifically, Parke, Davis was charged with entering into a "combination and conspiracy" with five named retailers and five named wholesalers as co-conspirators (Complaint, paras. 5, 6, 13; R. 2, 4; Plaintiff's Answers to Interrogatories 1, 2, R. 19, 20). This combination and conspiracy was alleged to consist of a "continuing agreement, understanding and concert of action" with several specific terms: an agreement with the five named retailers obligating the retailers not to cut prices on Parke, Davis products; an agreement with the same five retailers obligating them not to advertise cut prices on Parke, Davis products; an agreement between Parke, Davis and the five named wholesalers obligating the wholesalers not to sell Parke, Davis products to the price-cutting retailers; and an agreement with the same wholesalers regarding the prices at which the latter might resell Parke, Davis products (Complaint, para. 14, R. 4, 5; Plaintiff's Answers to Interrogatories 4(a), 4(c), R. 20, 21).[14]

[13] The Court's attention is directed to Appendix A to this brief, where record references have been assembled against each of the numbered findings to demonstrate that they are well supported.

[14] The Government's claim regarding the alleged conspiracy to fix the wholesalers' resale prices was not included in the statement of questions presented in either the Notice of Appeal or the Juris-

The critical findings are those concerned with the specific actions of Parke, Davis and the named retailers and wholesalers which the Government claims to have been conspiratorial, and which Parke, Davis contends, and the District Court found, to be merely unilateral. These actions must be considered in relation to each of the four aspects of the alleged conspiracy.

1. The Alleged Retailer Conspiracy Regarding Prices

The five retailers alleged to have agreed with Parke, Davis not to sell its products at cut prices were Dart Drug, Standard Drug, Drug Mart, Babbitt and Peoples (Plaintiff's Answer to Interrogatory 2, R. 20). Parke, Davis' representatives admittedly informed each of these retailers of its policy of refusing to sell to retailers who did not observe its recommended prices. The Parke, Davis representatives were not authorized to seek an agreement or undertaking from any of the retailers, but merely to state the policy (Fdg 12, R. 33; R. 271-72); and this is what they did with each retailer separately.[15]

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dictional Statement, although it was adverted to in a footnote in the Jurisdictional Statement (p. 17, n. 16). Under Rule 15 (1)(c)(1) and Rule 10(2) of the Revised Rules of this Court, that aspect of the case does not appear to be properly before the Court. Part of the claim, moreover, was the subject of a second cause of action which was dismissed with prejudice prior to trial of this case (Complaint, para. 17-22, R. 6-7; R. 27).

[15] While one witness, the proprietor of Dart Drug, indicated that he was requested to enter into an agreement with Parke, Davis (K. 61), the best evidence of the manner in which this policy announcement was made was produced by this same witness in a

The evidence shows that Dart Drug and Standard Drug at no time agreed to stop cutting prices; in fact, they were cut off by Parke, Davis because they continued to cut prices on its products (Fdgs 23, 21, R. 35-37; R. 61-62, 89, 90-91, 151-53).

No witness was called from Babbitt, but the evidence shows that Babbitt was cut off (Fdg 20, R. 35; R. 127, 208, 254), and it therefore indicates that Babbitt also must have continued to cut prices.

As far as Drug Mart is concerned, it is clear that the individual stores belonging to this group were always permitted by Drug Mart to sell at cut prices at all times, and even to advertise those prices individually if they saw fit (R. 148). While there were some discussions with Drug Mart concerning advertising of cut prices by the group, which will be discussed below,[16] these did not have to do with the prices actually charged in the individual stores (R. 148). The testimony in this regard was corroborated (R. 112-13) and is uncontradicted.

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contemporaneous memorandum which quoted the Parke, Davis representative as stating (G. Ex. 6, R. 98, 308):

> "That any direct account of Parke, Davis whether it be in Md., Virginia or D.C. which does not abide by minimum retail prices as listed in their catalog will be cut off from direct buying. Furthermore any wholesaler who sells a retail store below minimum retail prices as listed in our catalog will be cut off from direct buying."

No mention appears in this memorandum of the solicitation of cooperation, agreement, or any sort of commitment whatsoever; there is merely a flat statement of Parke, Davis' unilateral intentions. The policy was announced to the other retailers in substantially the same fashion (R. 101, 117-18, 151-52, 226, 241).

[16] See pp. 33-34, *infra*.

As to none of these four supposed co-conspirators, therefore, is there any evidence whatsoever to support the charge of conspiracy with regard to prices.

One other retailer, Peoples, was alleged to have conspired in this regard, but no witness from that company was called to testify. The only direct testimony regarding Parke, Davis' dealings with Peoples was that of a Parke, Davis representative. This witness testified that he had told a vice president of Peoples that Parke, Davis would not sell to Peoples if Peoples cut prices on Parke, Davis products, and that the vice president replied that Peoples would stop cutting prices (R. 226, 241, 247). He also testified as follows (R. 241):

> "Q. . . . Did you make any agreement with Mr. Downey [the vice president of Peoples]?
>
> "A. Never.
>
> "Q. You simply told him that you would refuse to sell him if he continued to advertise or charge cut prices, right?
>
> "A. Correct."

It is not clear, moreover, that Peoples did, in fact, stop charging cut prices (*cf.* R. 255-56).[17]

Evidence such as this clearly supports the District Court's findings that Parke, Davis merely announced

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[17] Other evidence bearing on Peoples' practices regarding its prices for Parke, Davis products includes the testimony of another witness that he was told by a Parke, Davis salesman that "Peoples was going to stop cutting prices, or had stopped cutting prices" (R. 147); testimony that prior to the visit from the Parke, Davis representative at which the Parke, Davis policy was discussed Peoples was cutting prices in only two of its stores (R. 63-64, 89-90); and testimony indicating that Peoples' price cutting had never been very vigorous (R. 255).

its policy and acted thereon, and neither solicited nor obtained an agreement or understanding from these retailer co-conspirators to adhere to the recommended resale prices (Fdgs 19-22, R. 35-36).

2. THE ALLEGED RETAILER CONSPIRACY REGARDING ADVERTISING

The supposed conspiracy not to advertise Parke, Davis products at cut prices involves the same five retailers (Plaintiff's Answer to Defendant's Interrogatory 2, R. 20). It will be recalled that after Parke, Davis found it was unable to maintain minimum resale prices by cutting off price cutters it announced it would cut off those customers who advertised cut prices.[18] It is clear that for a period of about a month after Parke, Davis announced this policy, there was no advertising of cut prices in the District of Columbia, although the retailers continued to sell Parke, Davis products at cut prices (Fdg 17, R. 35; R. 83, 111, 160, 273-74).[19] The issue here, however, is again whether this brief cessation of advertising came about as the result of a collusive arrangement between Parke, Davis and the retailers or, as the court found, resulted merely from the unilateral declaration of the Parke, Davis policy. An examination of the evidence as to each alleged co-conspirator shows the District Court's view of the evidence is fully supported by the proof.

The Government's principal witness on the so-called advertising conspiracy was Haft, the proprietor of

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[18] See pp. 12-13, *supra*.

[19] There was no evidence of any discontinuance of cut-price advertising in Richmond.

Dart Drug.[20] This witness testified that he made not one but two agreements with Parke, Davis on the subject of advertising (R. 64-65, 72-73)—in fact, he used the words "agree" or "agreement" 14 times in his testimony (R. 61, 64, 65, 67, 73, 74, 83, 84, 87).[21] In spite of his obvious desire to interlard his testimony with these magic words, however, he conceded that both of the "agreements" amounted to no more than this (R. 83):

> "Q. He [the Parke, Davis representative] simply said that . . . . if you did advertise he wouldn't sell to you, and if you didn't he would?
>
> "A. That is right, sir.
>
> "Q. And you said to him that if somebody else advertises I am going to advertise?
>
> "A. That is right, sir."

In this critical respect his testimony was consistent with that of the two Parke, Davis representatives with

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[20] The Government objects to Parke, Davis's characterization of this witness, in its Motion to Affirm, as the "main prop" of the Government's case (Brief for Appellant, p. 28 n. 19). But the witness' leading role in the case cannot easily be overlooked. He had instigated the investigation leading to the filing of the suit (R. 88 240), and had a personal financial interest in its outcome. See note 24 *infra*. He was also the Government's leading witness, and gave the most extensive testimony. Moreover, it may be noted that the Government's brief quotes this witness 16 times, and cites his testimony 43 times in all.

[21] In the companion criminal case, this witness testified that he had suggested to a vice president of Parke, Davis that "maybe there was some area of agreement we could have," and that the vice president had replied "nothing doing." (R. 86). In this case, his testimony was that the same vice president had asked him "if I was ready to agree to their terms." (R. 67).

whom he had discussed the question of advertising and who testified that they had not sought and did not have authority to seek, any agreement or undertaking from this or any other retailers, but had merely stated Parke, Davis' policy to him, and left him to decide his own course of action (R. 224-25, 257-59, 260, 261, 265, 271-72). In other respects, however, this witness' testimony was so often contradicted not only by other evidence[23] but even by his own testimony,[24] and his personal interest in this suit was so clear,[25] that it cannot be said that the trial judge committed error if he did not give full credence to Haft's testimony. Considering the evi-

[23] Haft testified that one of the wholesalers referred to the names of the retailers given him by Parke, Davis as a "blacklist" (R. 70); the wholesaler stated that this was "absolutely untrue" (R. 211). Haft also testified that Parke, Davis' branch manager told him, on his visit at the end of August, that the antitrust investigation was one of the reasons for the visit (R. 73); a Parke, Davis representative present at the meeting stated that "that is false" (R. 211). Moreover, all of this witness' testimony about Parke, Davis' efforts to get him to "agree" to raise his prices is belied by a memorandum prepared by him, apparently on the advice of his attorney, at the time of the visit from the Parke, Davis representative who announced the policy to him (Gov. Ex. 6, R. 98, 308). The memorandum, which the witness acknowledged to be accurate (R. 87), makes no mention whatever of any solicitation or suggestion of an agreement, undertaking or commitment of any kind. See note 15, *supra*.

[24] See the testimony at R. 84, where Haft first claimed to recognize and explained in detail a cut-price advertisement of Standard Drug, and then withdrew his testimony. See also note 21, *supra*.

[25] The evidence indicates that Haft instigated the present suit (R. 88, 240); that he had consulted his lawyer with regard to the possibility of bringing a treble damage action against Parke, Davis on the basis of the subject matter of this suit (R. 92) which, of course, would be facilitated by a Government victory in this suit; and that he was attempting in his dealings with Parke,

dence as a whole, it is clear there was no error in his conclusion that

> "Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them" (Fdg 23, R. 36-37).

One other alleged co-conspirator, Drug Mart, also ceased advertising price cuts on Parke, Davis products after being informed of the Parke, Davis policy; although this did not affect the policies of the individual stores as far as advertising or charging whatever price they wished, when selling Parke, Davis products (Fdgs 22, 23, R. 36-37; R. 83, 106, 113, 118), and Drug Mart of course continued to advertise cut prices on other manufacturers' products (G. Ex. 2, R. 76, 303-05; G. Ex. 22, R. 264, 311-13). The evidence regarding the reason for Drug Mart's action shows that a Parke, Davis salesman informed the "coordinator" of Drug Mart that Parke, Davis would not sell to any of the member stores if the organization continued its occasional group advertising of cut prices on Parke, Davis products (R. 147-48); that the coordinator asked the advice of the president of the organization (R. 147-48) and a committee of its members (R. 105-06); and that the committee decided by majority vote to stop the advertising in question in order not to be cut off by Parke, Davis (R. 105-06, 112-13).[25] Upon

Davis to lay a foundation for such a suit (R. 60-61, 62-63, 64, 66, 67, 85-87). It may also be noted that before he appeared as a witness in this case, Parke, Davis had ceased to have any dealings with him (R. 81-82; G. Ex. 5, R. 81, 307).

[25] The evidence also indicates that one reason Drug Mart discontinued the advertising was that Parke, Davis had informed

consideration of such evidence as this, the district judge correctly determined that both Parke, Davis and Drug Mart acted unilaterally, and that

> "Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement, or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdg 22, R. 36).

In addition to Dart Drug and Drug Mart, there were two other retailers, McReynolds Drug and State Drug, which, after the Parke, Davis announcement, temporarily took down their window signs which advertised cut prices (R. 99, 110, 119-20, 233, 260-66).[28] Neither of these, however, was even alleged to be a co-conspirator.

As to the three other retailers who were alleged to have conspired to stop cut-price advertising—Babbitt, Standard Drug and Peoples—there is a gaping lack of proof. The only proof of any response by any of them to the Parke, Davis notification was the testimony of the same principal complaining witness, Dart Drug's proprietor, that he was told all three were

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the buyer for Drug Mart, who had been passing along certain promotion payments to the members of the organization for use as discounts on Parke, Davis products, that this was an improper use of such promotion payments, and the buyer was therefore no longer interested in promoting Parke, Davis products (Fdg 22, R. 36, R. 242).

[28] McReynolds Drug and State Drug were among the five retailers who were cut off by Parke, Davis because of their price cutting (Fdg 24, R. 37, R. 102, 118-19). Although so instructed, they took down window signs mentioning cut prices on Parke, Davis products in response to the Parke, Davis announcement, both stores at all times actually sold such products at cut-prices (R. 111, 120).

"back in line" on advertising (R. 64, 74). There was no witness from Babbitt, however, and no evidence of any conversations between Parke, Davis and that organization on the subject of advertising; nor even any evidence that Babbitt in fact did any advertising, let alone ceased to advertise. There was no witness from Peoples, either, and the only evidence regarding any communication between Parke, Davis and Peoples on the subject of advertising was the testimony of a Parke, Davis representative, as follows (R. 241):

> "Q. You simply told him [the vice president of Peoples] that you would refuse to sell him if he continued to advertise or charge cut prices, right?
>
> "A. Correct."

The evidence also showed that Peoples advertised Parke, Davis products once at cut prices and once at the recommended prices during the period in question (G. Ex. 10, R. 109, 309), and that it was not unusual for Peoples to advertise at recommended prices (R. 265).

Finally, as to Standard, the evidence consists of testimony by a representative of that organization that he made no commitment to stop advertising cut prices (R. 159, 227-28), and evidence that Standard in fact advertised cut prices on Parke, Davis products while others were refraining from doing so (R. 83-84).

As to each of these retailers, the trial judge found that

> "Parke, Davis did not solicit any agreement and Peoples [Babbitt, Standard Drug] did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdgs 19-21, R. 35-36).

Taking this evidence—almost all of it oral testimony as a whole, and given the opportunity of the trial judge to observe the witnesses, there is ample support for his conclusion that the Government failed to prove the allegations of the Complaint, and for his findings as to each of the retailers alleged to be co-conspirators, that there was no conspiracy as to either prices or advertising.

3. The alleged wholesaler conspiracy regarding sales to retailers

With regard to the allegation of a conspiracy between Parke, Davis and the wholesalers not to sell Parke, Davis products to price-cutting retailers, five wholesalers are claimed to have been involved: District Wholesale, Washington Wholesale Drug Exchange, H. B. Gilpin Company, Powers-Taylor, and Murray Wholesale (Complaint, para. 5, R. 2). The evidence shows that Parke, Davis advised these wholesalers of its policy of refusing to sell to wholesalers who sold to price-cutting retailers and brought to their attention the names of some of these retailers (Fdgs 12, 14, R. 33-34; R. 137, 157-58, 163-64, 205). However, examination of the evidence as to each of the wholesalers fails completely to support the claim of conspiracy on this subject.

A representative of Washington Wholesale Drug Exchange was called as a witness, for instance, but he was not even asked by Government counsel whether he had curtailed sales to any retailers, and it was not shown that he in fact did so, or indeed that any of the price-cutting retailers even tried to obtain Parke,

Davis products from him (R. 244-62).[27] No representative of Murray Wholesale was even called to testify, and although there is evidence that this wholesaler was notified of Parke, Davis' policy,[28] there is no evidence that he undertook to, or did, act upon it. Moreover, the evidence shows that another wholesale drug firm in Richmond, which was not named as a co-conspirator, continued to sell Parke, Davis products to at least one of the price-cutting retailers in question (R. 154, 158).

This leaves three wholesalers—one in Richmond and two in the District of Columbia—who did attempt to curtail sales of Parke, Davis products to the retailers; these are Powers-Taylor, H. B. Gilpin Company and District Wholesale. The evidence shows that Powers-Taylor ceased selling Parke, Davis products to the one Richmond retailer for a period of three or four weeks (R. 166); and that District Wholesale and H. B. Gilpin, whose sales of Parke, Davis products to the price-cutting retailers were never very substantial (R. 59, 99, 103, 111-12, 141, 202-03), attempted without complete success to cut off those sales to the Washington retailers during periods of two weeks and eight weeks, respectively (R. 211, 212-13; R. 127, 129-30; R. 93-94). None of the wholesalers' sales of products other than Parke, Davis products to these retailers

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[27] Parke, Davis' branch manager and his assistant assumed, erroneously (*cf.* R. 154, 158); that all the wholesalers contacted ceased selling Parke, Davis products to the five retailers (R. 219, 257).

[28] A witness from Standard Drug testified that he had telephoned the president of that wholesaler, who "informed me that he had been notified by Parke, Davis and Company not to ship any of our stores their products." (R. 158).

were, of course, affected (R. 103-04, 143, 153; *cf.* R. 203-04).

As the Government itself is at pains to emphasize (Brief for Appellant, p. 11 n. 8, pp. 30-31), these wholesalers would not have cut off their sales of Parke, Davis products to the retailers in question had it not been for the statement to them of Parke, Davis' policy (R. 142, 168, 219). The critical question is, then, whether the nature of their response to that policy constituted an agreement or understanding; or whether, on the contrary, it was simply a unilateral effort by each to avoid the loss of Parke, Davis' patronage. On this determinative point there is no evidence that Parke, Davis sought any undertaking, agreement, assurance, or even statement of the wholesalers' intentions. In each instance, the Parke, Davis representative simply stated Parke, Davis' policy and nothing more (R. 124-26, 164, 197-98, 207). As for the nature of the wholesalers' response, the president of Powers-Taylor testified as follows (R. 167):

> "Q. They [Parke, Davis representatives] did not ask you to make any agreement?
>
> "A. No, sir.
>
> "Q. And you did not make any agreement about Standard?
>
> "A. No, sir.
>
> "Q. You understood that, if you sold Standard, you would be cut off?
>
> "A. That is right."

The evidence is the same as to the other two wholesalers. The president of the H. B. Gilpin Company testified that he neither was asked to make any agreement nor did make any agreement with the Parke,

Davis representative who communicated with him (R. 139); the vice president of Gilpin explained that the basis for the company's attempt to stop selling Parke, Davis products to the retailers in question was that if it continued to sell to them, it would itself be cut off by Parke, Davis (R. 130). As to District Wholesale, although the vice president of that company said that he had told the Parke, Davis representative; "I will go along with whatever you suggest" (R. 202; *cf.* R. 197, 203), both he and the president of this company, who actually made the decision to cease selling to the retailers (R. 197-98, 199, 210-11), stated that the basis of that decision was simply the knowledge that unless the company cut off the retailers' purchases of Parke, Davis products it would itself be cut off by Parke, Davis (R. 103-04, 210).[29] The president of District Wholesale testified, moreover, that it was the policy of most manufacturers to sever relations with a wholesaler under such circumstances (R. 210).

Evidence such as this, taken as a whole, not merely supports but indeed compels the conclusion that Parke, Davis unilaterally presented its policy to each wholesaler, and that each acted unilaterally in response thereto. The trial judge was clearly correct in finding that

> "There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers

[29] In several instances, a wholesaler explained to the retailers the reason for its refusal to supply Parke, Davis products (R. 71, 103-04, 153-54, 166, 199, 202, 208, 210). In no case was there any mention of any undertaking or commitment or adherence to a plan; rather, the only explanation given was that the wholesaler feared the loss of its own account with Parke, Davis (R. 71, 103-04, 153-54).

made any agreement with Parke, Davis on this subject." (Fdg 14, R. 34).

On this critical point, as on the others, the Government simply failed to prove the allegations of the Complaint.

4. THE ALLEGED CONSPIRACY REGARDING WHOLESALE PRICES

The Government's contentions regarding the alleged conspiracy to fix wholesale prices comprise two separate claims: one, concerning the resale prices recommended for wholesaler use in the Parke, Davis catalogue; and the other, the discounts offered to its customers by the Washington Wholesale Drug Exchange. Each of these claims has previously been abandoned, and neither appears to be properly before the Court.[40] The impropriety of the Government's attempt to revivify these claims is matched by its futility, for there is no substance to either of them.

On the first of these matters—*i.e.*, the recommendation of resale prices for use by wholesalers—the evidence shows no more than that Parke, Davis' wholesaler catalogue states, and has stated for many years, that it is Parke, Davis' policy to sell its products to wholesalers who observe the net price selling schedule set forth in its wholesale price list (G. Ex. 13, R. 135, 310; R. 130-31, 139, 162, 169, 196, 249); and that the wholesalers customarily observe these prices (R. 136, 184, 188, 190, 196; *cf.* R. 162-63). Aside from the statement in the Parke, Davis catalogue, there is no evidence of any communication whatsoever between Parke, Davis and the wholesalers, or any action taken

[40] See note 14, *supra*.

thereon by the wholesalers. The only evidence as to the reason for the wholesalers' use of the recommended resale prices indicates that they did so in order to avoid being cut off by Parke, Davis (R. 190; *cf.* R. 196). There is nothing to warrant even the faintest inference of agreement, understanding, adherence to a plan, concert of action, combination or conspiracy in this regard. As the trial judge concluded (Fdg 28, R. 38):

> "The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter."

As to the aspect of this claim that concerns discounts, the evidence shows that in early 1956 Washington Wholesale Drug Exchange, a cooperative, profit-sharing drug wholesaler, changed its billing practices as the result of a protest by Parke, Davis (R. 189). It had been showing and deducting an automatic 2% cash discount on the face of its invoices in connection with the sale of Parke, Davis goods, even in instances where prompt cash payment was not in fact made (R. 190-91, 270-71). After Parke, Davis' protest, Washington Wholesale ceased to show the 2% discount on the invoice, although the discounts continued in fact to be granted in a different form (R. 191, 209), so that the

change had no effect on the prices actually charged. As to the reasons Washington Wholesale made this change, the evidence shows nothing of conspiracy or the solicitation or offering of agreement, but simply a unilateral statement by Parke, Davis and a unilateral decision made by Washington Wholesale for fear of the loss of Parke, Davis' patronage (R. 190, 271). This is what the trial court found (Fdg 29, R. 38-39).

On neither aspect of the alleged conspiracy regarding wholesale prices, therefore, has the Government offered anything to warrant any consideration of the point by this Court, let alone an overturning of the findings of the District Court.

This analysis of the proof in the light of the allegations of the Complaint as particularized by the Government's answers to interrogatories demonstrates that the findings of the District Court are supported by substantial evidence and are not "clearly erroneous." Indeed, in each particular the proof adduced fails far short of showing the existence of any implied agreement. And the proof, taken as a whole, demonstrates a scrupulous regard by Parke, Davis for the limitations of the *Colgate* rule. It merely announced a policy setting forth the grounds on which it would refuse to sell, and carried out that policy.

The Government has failed to meet its burden under Rule 52(a). Therefore, the findings stand, and it remains only to demonstrate that the District Court correctly applied the law to the facts.

III

THE DISTRICT COURT CORRECTLY HELD THAT THE ACTION OF PARKE, DAVIS IN REFUSING TO SELL WAS NOT A COMBINATION OR CONSPIRACY IN VIOLATION OF SECTION 1 AND 3 OF THE SHERMAN ACT.

A. THE DECISIONS OF THIS COURT HAVE HERETOFORE PRESERVED THE INHERENT RIGHT OF A BUSINESS MAN VOLUNTARILY TO SELECT THE CUSTOMERS WITH WHOM HE WISHES TO DEAL.

As the facts recited above make clear, this case concerns an effort by Parke, Davis to promote and protect the sale of its own goods under intensely competitive circumstances. In an effort to prevent demoralization of its own trade it exercised its right to select customers as recognized in *United States* v. *Colgate & Co.*, 250 U.S. 300. In that case this Court held that in the absence of monopoly the exercise of the traditional right to refuse to sell to unacceptable customers in order to maintain minimum prices does not violate the Sherman Act:

> "The purpose of the Sherman Act is . . . to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. at 307.

There was, at first, some confusion in the lower courts as to the effect of the *Colgate* case upon the earlier decision of this Court in *Dr. Miles Medical Co.* v. *John D.*

Park & Sons Co., 220 U.S. 373, in which agreements to maintain resale prices had been found to violate the Sherman Act. The relationship of these two cases was, however, soon clarified.

In *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, this Court reversed the decision of a lower court which had interpreted *Colgate* as overruling *Dr. Miles* and set forth the basic distinction between the two cases:

> "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices." 252 U.S. at 99.

Shortly thereafter, in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, it was again made clear that the essential agreement, combination or conspiracy required by the Sherman Act might be implied from a course of dealing or other circumstances. In ruling upon a charge of the trial judge, however, the Court held that an agreement or combination forbidden by the Sherman Act could not be established by showing merely that the seller announced a suggested resale price to wholesalers and jobbers, that he called it to their attention on many occasions and that the great majority of them sold at the prices named.

In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, the *Colgate* principle was reaffirmed and found to apply in proceedings under Section 5 of

the Federal Trade Commission Act relating to unfair methods of competition. That case, and the many lower court Section 5 cases involving resale price maintenance which followed, held that a refusal to sell cannot, in itself, constitute unfair competition and may not be enjoined unless it is part of an otherwise illegal price maintenance scheme.

The effect of the *Colgate* case as defined by these decisions is clear. A manufacturer has the right, under the Sherman Act, to refuse to sell to any customer so long as there is present no element of monopoly, nor any agreement, express or implied, to fix prices. The agreement condemned by the Act may be implied from a course of conduct. It cannot be established, however, merely by a policy of refusals to sell, by the seller's announcement of such policy and by the customers' recognition of the policy. Once the distinction between *Colgate* and *Dr. Miles* had been clarified, there was no occasion for this Court to review cases of the *Colgate* type. The lower courts recognized the distinction between the two decisions and upheld the right of a manufacturer to refuse to sell to price-cutting retailers in the absence of any monopoly or agreement to fix prices.

In an early District Court case, Judge A. N. Hand gave the following statement of the *Colgate* principle:[1]

> "It is true that the distinction between an agreement by word or conduct to maintain a reselling price . . . and a warning that, if such a price is not maintained, future sales will be withheld, is

[1] United States v. Hudnut, 8 F.2d 1010 (S.D.N.Y. 1925). This appears to be the only reported case, after *Colgate*, in which the Government attempted to establish a Sherman Act violation primarily on the basis of refusals to sell.

delicate, and that the second may be accompanied by such circumstances as to show conclusively that a contract is really made. Yet there is a difference, and, if it is not observed, the right to refuse to sell to a customer, who does not by his conduct satisfy his vendor, will disappear. . . ."

The most recent statement of the *Colgate* principle, made by Judge Sobeloff in an opinion dealing with Section 3 of the Clayton Act, is equally clear:

"Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege, the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

"This is not to say however that the course of dealing between seller and buyer may not go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding. But whether there is such agreement is always a question of fact to be determined in light of all the circumstances when the case on a properly pleaded complaint is brought to trial . . . ." *McElhenney Co., Inc.* v. *Western Auto Supply Co.*,

1969 CCH Trade Cases, para 69,416 at p. 75,609 (4th Cir. No. 7813)

Whenever this Court has had occasion to consider a price-fixing conspiracy which incidentally involved a refusal to sell, it has been careful to distinguish the *Colgate* case and to reaffirm the right of the seller, acting unilaterally, to select customers. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 457; *Arbor's, Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207, 212.

In cases involving monopoly situations, the Court has also made clear that it did not intend to restrict the sellers' right of refusal to sell in the absence of monopoly. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155.

Recently, in *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, the right of a seller to select customers was carefully considered and reaffirmed by this Court on the basis of *Colgate*. The dissent in *Times-Picayune* was based upon a disagreement as to whether the defendant occupied a dominant position in the market, and did not raise any question as to the continuing validity of the *Colgate* principle.[32]

[32] The reply of the *Colgate* case is so well established that this Court has frequently referred to the provision in Section 2 (a) of the Clayton Act protecting the right to select customers as a codification of that rule. Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55, 64.

B. WHEREVER VIOLATION OF SECTION 1 OF THE SHERMAN ACT INVOLVING REFUSALS TO SELL HAS BEEN FOUND, THIS DETERMINATION HAS RESTED ON ADDITIONAL CONDUCT UNLIKE ANY FOUND HERE.

In all Section 1 cases where conduct involving a refusal to sell has been found illegal, the essential conspiracy or agreement has been established by substantial evidence in addition to the refusals to sell. The facts and circumstances of these cases present situations wholly unlike anything found here.[33]

United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, which is relied upon by the Government, is a good example. The manufacturer, Bausch & Lomb, had agreed to supply certain lenses to Soft-Lite and had made a written commitment not to supply such lenses to any other company or compete in any way with Soft Lite. Soft-Lite, in turn, distributed these lenses through optical wholesale companies, 60 per cent of the sales going to wholesalers controlled by Bausch & Lomb. Soft Lite permitted the wholesalers to sell only to "licensed", retailers who agreed to sell the lenses at prices prevailing in the locality and at a premium over comparable lenses. The illegality of the retail license arrangement binding dealers was so clear that it was conceded upon appeal.

The complete dissimilarity between *Bausch & Lomb* and the instant case is immediately apparent and was

[33] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, cited by the Government, involved the sufficiency of a complaint which alleged a conspiracy among ten leading appliance manufacturers, their distributors and a chain department store not to sell appliances to the plaintiff. Such a conspiracy would, the Court held, be illegal; there was, however, no occasion to consider whether there was evidence to establish the critical matter of agreement or conspiracy.

recognized by the trial judge in granting the motion for acquittal of the defendants in the earlier criminal case involving the same facts:

> "I do think, however, that the *Bausch & Lomb* case is readily distinguishable from the present case . . . by the factual situations.
>
> "In the *Bausch & Lomb* case there was a complicated series of licensing agreements, a system of franchises to retail dealers. In addition, the manufacturer, Bausch & Lomb, was the majority stockholder in the intermediate wholesale corporations with whom the defendant Soft-Lite was alleged to be conspiring.
>
> "It does seem to me in the present case that there is a complete lack of evidence indicating any conspiracy. . . ." *United States v. Parke, Davis & Co.*, 1957 CCH Trade Cases, para. 68,856 at pp. 73, 465-66 (D.D.C. Cr. No. 444-57).

In *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, there was again an extensive licensing system, and the defendant was found to have comprehensive control of the market in the distribution of lead-treated gasoline. In the words of the Court, Ethyl had

> ". . . established the marketing of the patented fuel in vast amounts on a nationwide scale through the 11,000 jobbers and at the same time, by the leverage of its licensing contract resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them." 309 U.S. at 457.

Again, the complete dissimilarity between this case and the instant case is readily apparent.

Trade association activity, as might be expected, has also been relied upon in finding a conspiracy. Thus, in *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F. 2d 651 (2d Cir. 1942), *cert. denied*, 317 U.S. 664, the court upheld a finding that the manufacturer had participated in a conspiracy with distributors, all of whom were members of a price maintenance trade association.[34] In *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (9th Cir. 1957), *cert denied*, 355 U.S. 835, the manufacturer was found to have conspired with members of the Acoustical Contractors' Association which had an allocation arrangement by which jobs were assigned to members in rotation and competitive bidding was eliminated. In each of these cases, the Court clearly stated the *Colgate* principle and recognized the need for substantial evidence aside from refusals to sell.

Reference should also be made to *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441. While this decision involves Section 5 of the Trade Commission Act,[35] which is not in issue here, it serves

[34] The opinion also noted that Continental had participated in joint meetings with the distributors, that each distributor had promised in writing to adhere to the price schedules of Continental and that various means were used to penalize non-complying retailers.

[35] In Federal Trade Commission v. Cement Institute, 333 U.S. 683, 708, rehearing denied 334 U.S. 839, it was held that "individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may, as a matter of law, constitute an 'unfair method of competition' prohibited by the Trade Commission Act." The interpretation of Section 5 was reaffirmed in Federal Trade Com-

to illustrate the type of conduct which the courts have found to be outside the permissible area of *Colgate*. Beech-Nut had adopted and maintained a nationwide scheme for distribution involving "the greater portion of the jobbers, wholesalers and retailers, respectively, in the grocery trades, and a large proporton of the jobbers, wholesalers and retailers in the drug, candy and tobacco trades, respectively, throughout the United States." 257 U.S. at 447. The Court emphasized that the essential element of illegality in this system lay in its reliance upon cooperative arrangements between Beech-Nut and its dealers, whose aid was enlisted in maintaining the price through various types of reporting devices and concerted conduct against offending customers. The cooperation of these dealers in maintaining suggested resale prices was requested and obtained by an extensive enforcement system involving the use of key numbers or symbols stamped on the cases of Beech-Nut products enabling it to ascertain the identity of the distributors from whom such products were purchased; card records containing the names of thousands of jobber, wholesale and retail distributors, and listing the names of those considered undesirable because they were price cutters; and an established practice of reporting the names of dealers who did not observe resale prices and employing salesmen or agents to assist in such reporting.

All of these cases demonstrate that where a conspiracy in violation of Section 1 is claimed, evidence far beyond a mere refusal to sell has been required to

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mission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 with a citation to the Beech-Nut case. Many of the cases cited by the Government involve Section 5 rather than the Sherman Act and, accordingly, are of doubtful applicability to the case at bar.

establish violation. While each case stands on its own facts, findings of violation emphasize concerted action between the seller and his customers against offending price cutters. This is often achieved through licensing arrangements, trade association activity, strict means of enforcement or the sheer economic power of the seller himself.

Nothing even vaguely similar is found in the present case. No comprehensive licensing system exists here, as in *Bausch & Lomb* and *Ethyl*, *supra*, and there is a complete lack of the market domination which characterized the latter case. No trade association activity is involved, and there were no group meetings or discussions between Parke, Davis' employees and the other parties. Parke, Davis' employees talked with the retailers and wholesalers individually and only when there was a clear and legitimate reason for doing so.

Finally, there was here no comprehensive resale price maintenance scheme with elaborate and effective means of enforcement. This case involves refusals to deal with only five retailers in the District of Columbia. Parke, Davis did not use special agents or solicit information on price cutting. Such complaints as it received were made to regular Parke, Davis employees in the course of calls upon customers (R. 239). Parke, Davis made no attempt, by marks, card indexes or other means, to trace the products received by retailers and did not prepare or circulate lists of price cutters. Indeed, there was no reporting system of any kind.

It is not, of course, necessary that a conspiracy be successful to constitute a violation under Section 1 of the Sherman Act. There must be a conspiracy, however, and the limited scope and ineffectiveness of the Parke, Davis refusals to sell in maintaining resale

prices is therefore significant on the question of its existence in fact. Where conspiratorial agreement has been implied, the effectiveness of the price maintenance activity in cases before this has been very specific and clear.

Here, Parke, Davis was aware of the fact that its right to refuse to sell could be exercised only if the action was unilateral. Its attorneys were well aware of the limitations of *Colgate* and had given good advice. Its employees and representatives, in turn, were instructed not to go beyond such a refusal and they did not do so. The experience of Parke, Davis is a fulfillment of the prediction made by Professor Chafee in 1928, not too long after the clarification of the *Colgate* principles by this Court, that resale prices could not be effectively maintained by a seller exercising his right to refuse to sell. *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 991 (1928).

The complete lack of any circumstantial evidence of the type normally relied upon to prove a conspiracy adds great weight to the findings, in this case, that no conspiracy existed. It also makes apparent the heavy burden which the Government bears in attempting to establish that these findings of the trial court are clearly erroneous.

C. THE EVIDENCE ON WHICH THE GOVERNMENT RELIES IS NOT SUFFICIENT TO SUPPORT AN INFERENCE OF CONSPIRACY.

As considered in detail above, the evidence fully supports the findings of the trial court that no conspiracy existed. From a careful consideration of the cases, it is also clear that the usual circumstances from which a conspiracy is inferred—license agreements, trade association activity, economic domination or an elaborate enforcement system—are entirely lacking. In

the absence of any real basis for establishing a conspiracy, the Government has attempted to do so by attaching seductive labels to the unilateral acts of Parke, Davis and its customers which are necessarily involved in exercising the rights assured by the *Colgate* decision.

The Court of Appeals for the Eighth Circuit has provided an excellent formulation of the proper approach in Sherman Act cases involving refusals to sell:

> "From the mere fact of refusing to sell to plaintiffs, there can . . . arise no inference of an unlawful agreement, because one may lawfully select his own customers. [Cases cited]. There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. 'A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion.'" *Johnson* v. *J. H. Yost Lumber Co.*, 117 F.2d 53, 61 (8th Cir. 1941).

Whether an agreement or conspiracy existed depends upon facts and cannot be resolved by name-calling. To refer to a seller's policy of not selling to price-cutters as a "campaign" or to call the announcement of this policy a "threat" does not change the facts. To be sure, Parke, Davis announced its policy generally to all customers in advance, but its right to do so was expressly recognized in *Colgate* and subsequent cases. To be sure, customers who had been cut off wanted to be reinstated and Parke, Davis was thus obliged to reiterate its policy and explain that customers who cut prices would not be sold. But there is nothing to indicate that

these conversations were anything more than reiteration of the policy.

Nor does it change matters to characterize the recognition of this policy by some customers as "forced cooperation." This Court held very explicitely in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, that adopting a policy of refusals to sell, calling the attention of customers to this policy and the customers' acquiescence in it are not sufficient to establish a violation of the Sherman Act. Indeed, any other view would make the *Colgate* decision meaningless.

Hard put to point to a course of conduct from which agreement can be implied, the Government seeks to attach the label "concerted action" to Parke, Davis' dealings with the retailers on the subject of prices by emphasizing the concern of some of the retailers for what their competitors were doing. But the fact that a businessman is concerned about what his competitors are doing, and governs his behavior in part according to theirs, does not of itself give rise to an inference of conspiracy. Certainly no such inference can be supported here, in the face of repeated and uncontradicted evidence that Parke, Davis announced its policy to each retailer separately (R. 59, 100-01, 117-18, 124-46, 151-52), and applied it to each retailer separately regardless of what others might or might not be doing (R. 63-64, 90, 117-18, 151-53).

Similarly, the facts that no retailer was willing to cease advertising until he thought his competitors were doing the same, and that each was determined to advertise as soon as anyone else did, merely show normal, predictable, competitive behavior to be expected from sensible businessmen, and give rise to no inference of deliberately concerted action. Moreover, any such

inference here is negated by uncontradicted evidence that, as far as Parke, Davis was concerned, its policy was applicable alike to each retailer individually, regardless of whether other retailers abided thereby (R. 260-61).

The situation as to wholesalers is the same: although one wholesaler, concerned about its competitors, twice asked Parke, Davis representatives whether other wholesalers were also being informed of the policy (R. 198, 202, 206, 207), it was clear at all times that Parke, Davis' policy was applicable to each wholesaler separately, whether or not retailers or other wholesalers responded to the policy (R. 253)—as at least one wholesaler, in fact, did not (R. 154, 158).

None of these aspects of the case involves coercion, boycott or concerted action by Parke, Davis with its customers to enforce minimum prices. Parke, Davis always acted unilaterally in its own business interests, attempting to preserve the system of distribution it considered sound. Those retailers and wholesalers who adhered to the Parke, Davis policy—and only some of them did—acted in their own self-interest to avoid being cut off, and not in order to join forces with Parke, Davis in the accomplishment of any common purpose.

The Government also places great emphasis upon statements of some of its witnesses to the effect that they did "go along with PD" or "agreed to abide by PD's policy." On analysis these statements are not controlling or indeed even persuasive.[36] The crux of

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[36] The Government is at pains to ridicule the testimony of a number of witnesses to the effect that they did not enter into any "agreement" with Parke, Davis, contending in effect that it is not the use of the word "agree" that determines whether a conspiracy

the matter is not whether the witness used the word "agreed" or a similar term; rather, it is whether Parke, Davis sought to obtain an agreement with its customers rather than merely to inform them of its policy and the action the Company proposed to take. The evidence is clear that Parke, Davis did not go beyond a statement of its position, which was unilateral and permissible under *Colgate*, when it informed customers that they would be cut off if they failed to maintain minimum prices or if they advertised cut prices. Such statements solicited no agreement and for that matter did not even require a response. Surely a customer creates no legal liability if he responds by saying colloquially "I'll go along" or "I agree to go along."

Since the retailers made no express or implied agreement with Parke, Davis not to sell at cut prices and indeed throughout the entire period most of them continued to cut prices on Parke, Davis products, it is difficult for the Government to sustain its position as to the retailer phase of the conspiracy. The Government seems, therefore, to place its greatest emphasis on the wholesaler aspects of the case. It is urged that wholesalers were pressured, forced to cooperate, coerced and organized into a boycott of the retailers. Repeatedly the wholesaler is pictured as a competitor of Parke, Davis dependent on Parke, Davis for sur-

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is formed, but the nature of the participants' conduct (Brief for Apellant, p. 34, and nn. 23, 24). The Government's contention on this point is belied by its own excessive reliance, both here and in the court below, on the use of the word "agree." See, *e.g.*, R. 61, 65, 101, 224, 225, 229, 264; Brief for Appellant, pp. 9, 10, 11, 12, 13, 14, 25, 30, 35. Parke, Davis agrees fully, however, that the critical question is not the specific words by which the witnesses characterize their conduct or conversations, but the actual nature of the events they are describing.

vival and existing at Parke, Davis' mercy. These various characterizations ignore the evidence and the actual business realities of the situation as disclosed by the record.

Parke, Davis was merely one of many pharmaceutical lines handled by these wholesalers, and no exclusive dealing arrangement or licensing system was involved. The wholesaler's only interest was in continuing to carry Parke, Davis goods so that he could offer a full line to the trade. When Parke, Davis announced it would refuse further dealings if the wholesaler sold to price-cutting retailers, it was obviously in the interest of the wholesaler not to make such sales. He followed this course for the simple reason that he desired to handle Parke, Davis goods and knew that he would be cut off if he did not (R. 103-04, 154, 167, 210). The action did not involve concerted action with Parke, Davis to injure the trade of the retailers.

As the district judge stated in granting Parke, Davis' motion for an acquittal in the companion criminal case,

> "In other words, when representatives of Parke, Davis Company went to the Gilpin people or to the District Wholesale Drug Company, they said in effect, you can dispose of these goods as you see fit but if you sell them to retailers that are not maintaining our prices, we will not sell to you in the future. I think that doesn't constitute an agreement when the wholesaler, looking to his own future business and his future financial interest, decides that he is going to maintain this price." *United States* v. *Parke, Davis & Co.*, 1957 CCH Trade Cases, para. 68,856, (D.D.C. Cr. No. 444-57) at p. 73,466.

Nothing in the cases teaches that the right to unilaterally select customers is confined to retail customers but excludes wholesaler customers. On the contrary, the *Colgate* case itself involved a refusal to sell to wholesalers by a manufacturer which also sold directly to retailers, and wholesalers have frequently been involved where the legitimate exercise of the right of refusal to sell was recognized.[37]

For the Government to refer to Parke, Davis' dealings with the wholesalers as a boycott merely begs the question. A boycott would involve an agreement between the wholesalers and Parke, Davis and there was no such agreement here. Nor does the Government bring this case within the rule of *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, by emphasizing that Parke, Davis and its wholesalers are to some extent competitors. In that case there were admittedly written price agreements between McKesson and its wholesalers, and the status of McKesson as a competing wholesaler was significant only in determining whether these agreements were within a statutory exemption from the Sherman Act. Here, there are no agreements.

A conspiracy or agreement under Sections 1 and 3 of the Sherman Act could have been found in this case

[37] In the Beech-Nut case, for example, the manufacturer had refused to sell to "jobbers, wholesalers and retailers who failed to maintain the resale prices so fixed by it, or who sold to other distributors who failed to maintain such prices; . . ." 257 U.S. at 445. This Court made no distinction between wholesale and retail distributors in directing modification of the enforcement order. As to both, the right of refusal to sell was preserved, and the prohibition was limited to cooperative methods used to carry into effect the price maintenance scheme which had been found to violate Section 5 of the Federal Trade Commission Act.

only if the District Court had been willing to go beyond the rules developed in other cases. This would have been, in substance, to disregard *Colgate*, to brush aside the express statutory requirement that a conspiracy or agreement must be proved, and to decide that the Sherman Act has destroyed the right of a businessman to select his customers. The Government has presented nothing in the circumstances of this case to warrant so drastic a revision of long-standing law.

IV

THE DISTRICT COURT CORRECTLY HELD, AS AN ALTERNATIVE GROUND FOR DISMISSING THE COMPLAINT, THAT THE GOVERNMENT WAS NOT ENTITLED TO INJUNCTIVE RELIEF.

The District Court also held that the awarding of injunctive relief was neither necessary nor appropriate, even had Parke, Davis, contrary to the court's findings, been engaged in unlawful price activities. In order to overturn the District Court's determination on this point, the Government must make a "strong showing of abuse" and demonstrate that there was "no reasonable basis" for his determination. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 634.

The following guide for determining whether injunctive relief should be granted was set forth in *United States* v. *W. T. Grant Co., supra*:

> ". . . the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a

> strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." 345 U.S. at 633.

The Parke, Davis practices on which the Government's case is based occurred only in Washington, D. C. and in Richmond, Virginia during the summer of 1956, and lasted over a period of no longer than four months. The actual refusals to sell involved only five out of 260 retailers in the District of Columbia, and one out of 100 in Richmond. The effort to prevent price cutting and advertising of price cuts was wholly ineffective.

By November, 1956—almost three years ago—Parke, Davis had abandoned its policy of refusing to sell to price-cutting retailers. Since that time, retailers in both the District of Columbia and Richmond, Virginia have continuously sold and advertised Parke, Davis products at cut prices and have been able to obtain these products from wholesalers and or Parke, Davis itself.

The determination of the trial judge that business and economic reasons had compelled abandonment of the policy of refusing to sell to price-cutting retailers seems almost unavoidable.

Under the tests set forth by this Court in the *W. T. Grant* case, there was clearly a reasonable basis for the conclusion of the trial court that injunctive relief was neither necessary nor appropriate.

CONCLUSION

The District Court properly applied the law to the facts. The Government has failed to show any reason why this Court should attempt to retry the case, let

alone set aside detailed findings of fact which are based on substantial evidence and which therefore are not "clearly erroneous."

The record shows that Parke, Davis kept well within the permissible area of conduct delineated in *United States* v. *Colgate*. It unilaterally announced a policy and unilaterally carried it out by means of refusals to sell; it engaged in no conduct from which collusive price-fixing could reasonably be implied. There was no agreement or conspiracy to fix prices in violation of the Sherman Act. The judgment of the court below should be accordingly affirmed.

Respectfully submitted,

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SEPTEMBER 24, 1959.

APPENDIX A

Specific Findings by the Trial Court and Supporting Record References

Set forth below are the trial court's specific findings of fact (R. 31-39), together with references demonstrating that each is well supported by the record:

Findings of Fact

1. The defendant, Parke, Davis & Company (hereinafter referred to as Parke, Davis) is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at Detroit, Michigan. It transacts business and is found within the District of Columbia. It maintains a branch office at Baltimore, Maryland, to which pharmaceutical products are sent in interstate commerce from its principal plant in Michigan. These products are then distributed in interstate commerce from its Baltimore office to various drug wholesalers and retailers, including drug wholesalers and retailers in the District of Columbia and the State of Virginia (Complaint and Answer, paras. 2; 3, 89; R. 1-3, 9-10). The Baltimore branch office operates in accordance with policies laid down by the Company's home office in Detroit (R. 251, 265).

2. Parke, Davis manufactures approximately 600 different pharmaceutical products, including both prescription and non-prescription items (R. 89). In 1956, the total dollar volume of its sales in the District of Columbia and Richmond, Virginia, was as follows:

	To Retailers	To Wholesalers
District of Columbia	$499,304	$161,247
Richmond, Virginia	58,870	113,651

(R. 182).

3. Parke, Davis' sales constitute less than 5% of the sales of pharmaceutical products in the District of Columbia and Richmond, Virginia (R. 271). There are about 2,000 different drug manufacturers selling about 178,000 different drug items in the District of Columbia (R. 140).

4. Plaintiff makes no claim that the prices for Parke, Davis products are not competitive with similar products

produced by other pharmaceutical manufacturers (Plaintiff's Answer, dated Jan. 3, 1958, to Defendant's Interrogatory 6 (1) (a), R. 17). Parke, Davis' products are sold in the District of Columbia and the State of Virginia in intense competition with the products of other manufacturers (R. 273-75).

5. Retailers may buy Parke, Davis products either directly from Parke, Davis or from wholesalers (R. 59, 195-96). Ordinarily, their large volume purchases are made from Parke, Davis which offers a lower quantity price on some of its products than the wholesalers offer (R. 59, 79-81, 111-12, 132, 140-41, 196, 203, 224, 252). The wholesalers, on the other hand, provide the retailers the convenience of smaller quantity purchases, day-to-day service, and a wide variety of products of many different manufacturers (R. 99, 141, 224, 271).

6. During the period covered by the Complaint, there were no Fair Trade laws in effect in either the District of Columbia or the State of Virginia (R. 101, 160, 227).

7. Suggested minimum resale prices were unilaterally established by Parke, Davis for retailers and wholesalers in the District of Columbia and Virginia and elsewhere, and were published to the trade long before the summer of 1956 (R. 56-58, 130-31, 139, 162, 190, 218; G. Ex. 1, R. 57, 301; G. Ex. 13, R. 135, 310A-10B).

8. The Parke, Davis catalogue for retailers contained the following statement under the heading "Minimum Retail Pricing Applying to Parke, Davis Products"

> "The minimum Retail Prices herein set forth or in the Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those States which have not enacted Fair Trade Laws." (G. Ex. 1, R. 57, 301).

9. The Parke, Davis catalogue for wholesalers contained the following statement under the heading "Wholesale Drug Trade Sales and Distribution Policy"

> "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe the Net Price Selling Schedule in this Parke, Davis & Company Wholesale Drug Trade Biller's Price List and Supplements, and who

confine their distribution of Parke, Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions." (G. Ex. 13, R. 135, 310A-10B).

10. Parke, Davis did not have any regularized or systematic machinery for maintaining its suggested minimum prices as to either retailers or wholesalers. It did not regularly "shop" stores, maintain card index files, or in any other manner police its suggested minimum prices in either the District of Columbia or Virginia (R. 239), nor is there any evidence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested minimum prices.

Parke, Davis learned of the price cutting through its salesmen who called at those retail stores which ordered directly from Parke, Davis; the salesmen reporting the cut prices and advertising thereof, due to the complaints of such retailers (R. 239).

11. In the spring of 1956, Parke, Davis also had a policy of refusing to sell to retailers it deemed to be undesirable customers, including those whose failure to maintain suggested minimum retail prices disrupted the market, and of refusing to sell to wholesalers who sold to retailers who were considered undesirable (R. 169-70, 220, 236-67, 249-50).

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell to these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit (R. 222-23, 251-52). This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws (R. 279). At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company (R. 250-52). Upon the basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia (R. 274), and upon his return he instructed his

assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer (R. 253). Parke, Davis did not seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences (R. 271-72). These instructions were carried out in July, 1956 (G. Ex. 6, R. 98, 308; R. 101, 117-18, 151-52, 226, 241).

13. When five retailers continued, despite the announcement of Parke, Davis' intentions, to sell Parke, Davis products below the suggested minimum retail prices, Parke, Davis discontinued selling to them and told wholesalers in the District of Columbia and Virginia that it would discontinue selling to them also if they sold Parke, Davis products to those retailers (R. 253-54).

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices (R. 137, 163-64, 205). Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves (R. 103-04, 130, 138, 164-65, 167, 210), although occasionally such products were sold by inadvertence to those retailers (R. 129-30, 211). There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject (R. 124-26, 130, 139, 167, 210).

15. The retailers who were cut off by Parke, Davis because they failed to observe Parke, Davis' suggested minimum retail prices continued nonetheless to advertise such products at cut prices by window displays (R. 101-03, 110, 119) or newspaper advertisements (G. Ex. 2, R. 76, 303-04) for the reason that they still had such products in their inventory.

16. Advertising of price cuts by a few retailers in the District of Columbia was, so far as Parke, Davis products were concerned, confined to a few products, mostly certain popular vitamins (R. 89, 111). In some cases, the prices quoted in the advertisements were below the price at which

a small retailer could purchase the same product from Parke, Davis or one of its wholesalers (R. 91-92). These advertisements injured the good name and marketability of Parke, Davis' products generally and resulted in Parke, Davis losing the support and confidence of the great majority of the retailers upon whom it relied for the promotion of its goods (R. 237-38, 272-73). The principal cut-price advertiser, Dart Drug, encouraged customers responding to its advertisements to purchase its own private brand of vitamins, and the proprietor of that concern acknowledged that on occasion its salesmen had switched customers requesting Parke, Davis products to such Dart private brands (R. 94-95). This was one of the purposes of cut-price advertising (R. 237-38).

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows (R. 83-84, 109-10, 119-20, 154, 159, 257-58, 260-61). Parke, Davis then resumed selling its products to each of these retailers (R. 234-35), and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices (R. 84, 112; G. Ex. 10, R. 109, 309). Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers (R. 258, 260-61).

18. Although advertisements featuring Parke, Davis products at cut prices commenced to appear again in newspapers in the District of Columbia at the end of September 1956 (R. 84, 112), and although the retailers which had ceased such advertising thereafter resumed it (R. 75-76), Parke, Davis took no further action with regard to retail prices or advertising, and it continued to sell to all retailers concerned (R. 75-76, 81, 110-11, 122).

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that

Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples (R. 226, 241). Parke, Davis did not solicit any agreement, and Peoples did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising (R. 241).

20. No witness was called connected with Babbitt. There is no evidence that Parke, Davis solicited any agreement, or that Babbit entered into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. However, sales to Babbitt were curtailed for a period of time and later resumed (R. 127, 208, 254).

21. Standard Drug was advised of Parke, Davis' policy and informed that if it continued to cut prices on Parke, Davis products it would be cut off (R. 151-52, 157). It made no commitment of any kind to Parke, Davis, it continued to cut prices, and it was cut off for about two weeks (R. 151-53). Parke, Davis did not solicit any agreement, and Standard Drug did not enter into any agreement or understanding of any kind with Parke, Davis concerning either prices or advertising.

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in cooperative advertising and purchasing (R. 146). From time to time, Drug Mart advertised cut prices on Parke, Davis products (R. 113). Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued and Drug Mart in fact discontinued such advertising for a period of several months (R. 106, 112-13, 147-48). There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount (R. 241-42). Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. The evidence shows that each member store of the organization was free to charge whatever prices it wished and to advertise as it wished, regardless of whether there was any joint advertis-

ing of Parke, Davis products (R. 106, 112-13, 148; Stipulation, R. 26).

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy (R. 61-62, 89). Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it (R. 82-83, 224-25, 232). Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis (R. 64-65). When it again advertised Parke, Davis refused to sell (R. 65). Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter (R. 74-76). At all times, Dart Drug sold Parke, Davis' products at cut prices in its store, whether or not it was advertising them (R. 83). Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them (R. 60, 224-25, 230, 231-32, 257-59; G. Ex. 6, R. 98, 308).

24. State Drug and McReynolds Drug were among the retailers who were cut off by Parke, Davis when they continued to sell Parke, Davis products at cut prices after Parke, Davis' policy had been announced to them (R. 230). Neither concern individually advertised cut prices in the newspapers (R. 110, 119-20), though they did through Drug Mart, an association of independent retailers (R. 104-05, 121, 146). While neither one was alleged to have conspired individually with Parke, Davis as to pricing, advertising or any other matter, the Drug Mart group, of which State and McReynolds were members, was alleged to have conspired with Parke, Davis as to pricing and advertising (Plaintiff's Answer to Defendant's Interrogatory 2 (a), R. 12, 20).

25. No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis & Company products (*cf.* R. 83, 110, 120, 160).

26. On December 12, 1957, subsequent to the trial of

the companion criminal action, Parke, Davis informed Dart Drug Company that it was permanently closing the Dart account and did not intend to have any further dealings with that company (G. Ex. 5, R. 81, 307). Since that time, Parke, Davis has not sold its products to Dart Drug (R. 81). There is no evidence, however, that Parke, Davis made any effort to influence the dealings of Dart Drug with the wholesalers, and Dart Drug has continued to purchase Parke, Davis' products from wholesalers in the District of Columbia and to sell and advertise such products at cut prices (R. 82). Parke, Davis' action in ceasing relations with Dart was a purely unilateral one, and there is no evidence that it had any relation to Dart's prices or advertising policies.

27. In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell (R. 173-75). Since the fall of 1956, and up until the present time, retailers in both areas, including retailers alleged to be co-conspirators, have continuously sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and or Parke, Davis itself (R. 82-83, 110-11, 122, 160-61). Parke, Davis has made no efforts to compel the cessation of these practices (R. 75-76, 110-11, 122). There is no proof or indication of any intention on the part of Parke, Davis to resume such efforts. There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia.

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis (Complaint, para. 14(a), R. 5). The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke,

Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis (R. 130-31, 139, 162, 184, 190, 196). There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.

29. The evidence shows that in early 1956 Washington Wholesale Drug Exchange, a cooperative, adjusted its practices in billing its customers on Parke, Davis goods so as not to credit any of its accounts with a cash discount on the face of the invoice, when Parke, Davis pointed out that it was crediting for a cash discount without proof that cash had in fact been paid (R. 268-69). Its billing practices were inconsistent with the suggested minimum resale price policy of Parke, Davis, which took no action to prevent the granting of cash discounts whenever they had in fact been earned (R. 270-71). Under the modified billing procedures, cash discounts were still granted in a different form (R. 269). The evidence shows that in making this change in its billing practices, Washington Wholesale was merely conforming to Parke, Davis' minimum resale price policy (R. 190), and did not make any agreement as to price (R. 190).

30. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to sell pharmaceutical products only to retailers licensed to fill or dispense prescriptions (Complaint, para. 14(f), R. 5). The evidence shows that the wholesalers were familiar with Parke, Davis' policy in this respect as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 refused to sell Parke, Davis' products to non-drug outlets because they each separately recognized that if they did not adhere to this policy, Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis (R. 139-40, 162, 167-68, 184, 190, 196-97). There is no evidence that any of them made any agreement with Parke, Davis as to sales to non-drug outlets, or that Parke, Davis ever solicited an agreement from any of them as to this matter.

31. There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more

than one wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer (R. 59-60, 72-73, 100-01, 109-10, 117-18, 119-20, 124-26, 137-38, 147, 151-52, 154-55, 163-64, 197-98, 206-07, 260-61).

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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

Appellee contends (Br. 19–20) that the Government raises no issue "as to the applicable law," but is "asking this Court for a trial *de novo* on the record below in an antitrust proceeding * * * without anywhere in its papers specifying any particular finding or findings which are challenged as clearly erroneous"; and that we are seeking to have this Court apply the law "to a version of the facts wholly at variance with the specific findings of the trial court."

As pointed out in our main brief, however, the basic underlying facts, as found by the district court and as supplemented by uncontradicted evidence, are not in dispute. The dispute is whether, as the Government contends, these uncontradicted facts estab-

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lish that Parke Davis engaged in an illegal price-fixing conspiracy, or whether, as the district court held, they show only a unilateral refusal to deal. This presents a legal, not a factual question; or, at most, a mixed question of law and fact in which there is no controversy as to subsidiary evidentiary matters. The issue presented to this Court for determination is, therefore, one traditionally subject to appellate review and in no degree involves any intrusion upon the fact-finding functions of the trial court.

1. The trial court made 31 "Findings of Fact" (R. 31–39), many of which are lengthy and embody numerous subsidiary findings. A number of the findings contain conclusory statements that Parke Davis did not enter into any "agreement" with specified retailers or wholesalers, or with these two categories of customers generally. It is those portions of the findings that appellee primarily relies on to support the judgment below, and that it contends (Br. 22–42) "have not been shown to be clearly erroneous and should not be set aside" (Br. 22).

These statements, however, are not "findings of fact" in the sense that they constitute the court's resolution of disputes with respect to, or its determination of, the underlying facts. Indeed, as appellee's brief itself indicates, there is no real dispute with respect to what Parke Davis did. These statements merely embody the court's ultimate conclusion as to the legal significance of those facts, *i.e.*, that, as a matter of law, the undisputed facts do not establish a conspiracy. Since we think that this holding mis-

applied the law, we necessarily reject the notion that this Court is bound by, and must accept, those portions of the findings which embody these erroneous legal conclusions. Specifically, we challenge, as reflecting errors of law, the next to the last sentence in finding 12 (R. 33), the last sentence in finding 14 (R. 34), the last sentence in finding 17 (R. 35), the last sentence in finding 19 (R. 35), the next to the last sentence in finding 22 (R. 36), and the last sentences in findings 23 and 28 (R. 36–37, 38). For the convenience of the Court, we have set forth in an appendix the foregoing findings, with the challenged portions italicized.

2. Apart from these conclusory statements, we challenge only part of one sentence of one finding dealing with the substantive issues, and part of one finding dealing with the need for relief. Since another substantive finding may be ambiguous, we challenge it to whatever extent it may be contrary to the undisputed facts of record. Of course, we also rely upon other undisputed facts which the trial court did not refer to in its findings.

a. We challenge that portion of the second sentence of finding 10 (R. 32), that states that Parke Davis did not "in any other manner police its suggested minimum prices in either the District of Columbia or Virginia." The policing point is discussed in our main brief in note 22, page 33.

b. We challenge those portions of finding 27, which deals with the likelihood of resumption of Parke Davis' resale price maintenance attempts, that are set

out below.[3] The lack of any evidentiary support for the trial court's conclusion that there is no reasonable probability that appellee would resume its resale price-fixing activities is discussed at pages 41 to 47 of our main brief.

c. We argued (Br. 24–29) that the record showed that, in its visits to individual retailers and wholesalers, Parke Davis told them that it was also approaching other retailers and wholesalers with respect to price-cutting and advised some as to the proposed actions of others; and that the trial court therefore erred in stating in its opinion (R. 29) that "every visit made by the [Parke Davis] representatives to the retailers and wholesalers was, to each of them, separate and apart from all others." Appellee does not deny that its representatives advised the retailers and wholesalers that it was thus contacting other customers. To whatever extent finding 31 may represent the contrary view, we challenge it.

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[3] The challenged portions of finding 27 read:

> In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell. * * * There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia [R. 37–38].

Finding 31 states:

> There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more than one

3. The Government, therefore, is not seeking a trial *de novo* of contested factual issues, but only a determination of the proper legal conclusions to be drawn from uncontested facts. For there is no dispute as to what Parke Davis actually did in its "attempt to maintain retail prices in the areas in question" (Appellee's Br. 14). Appellee does not, nor could it on this record, deny that it cut off the price-cutting retailers and induced its wholesalers to do so; that in its repeated visits to the retailers and wholesalers it advised them that it was also contacting other retailers and wholesalers and that they were cooperating; and that it resumed selling to the cut-off retailers, and permitted its wholesalers to do so, only after they had undertaken to stop, and had stopped, their cut-price advertising. Its argument is that, despite these facts, no conspiracy was shown because, during its campaign to coerce the retailers and wholesalers into complying with its resale maintenance policies in non-"fair trade" areas, Parke Davis studiously refrained from seeking express "agreements" to maintain prices; and instead purported merely to inform its customers one at a time of its policy as to the terms upon which it would deal with them. Appellee concedes (Br. 57), however, that the legality of its actions does not turn on "whether the witness used the word 'agreed' or a similar term." The crucial question, necessarily, is the legal significance of what it

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wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer [R. 39].

did. As shown in our main brief, Parke Davis' actions went far "beyond the exercise of this right [to refuse unilaterally to deal], and by contracts or combinations, expressed or implied, unduly hinder[ed] or obstruct[ed] the free and natural flow of commerce in channels of interstate trade". *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1959.

APPENDIX

Findings in Which the Government Challenges the Court's Legal Conclusion That There Was No Agreement

(Challenged portions are italicized) (R. 33-37, 38)

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit. This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws. At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company. Upon the basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia, and upon his return he instructed his assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer. *Parke, Davis did not*

seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences. These instructions were carried out in July, 1956.

* * * * *

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices. Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves, although occasionally such products were sold by inadvertence to those retailers. *There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject.*

* * * * *

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows. Parke, Davis then resumed selling its products to each of these retailers, and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices. *Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers.*

* * * * *

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples. *Parke, Davis did not solicit any agreement, and Peoples did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.*

* * * * *

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in cooperative advertising and purchasing. From time to time, Drug Mart advertised cut prices on Parke, Davis products. Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued, and Drug Mart in fact discontinued such advertising for a period of several months. There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount. *Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.* The evidence shows that each member store of the organization was free to charge whatever prices it wished and to ad-

vertise as it wished, regardless of whether there was any joint advertising of Parke, Davis products.

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it. Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis. When it again advertised Parke, Davis refused to sell. Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter. At all times, Dart Drug sold Parke, Davis' products at cut prices in its store, whether or not it was advertising them. *Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them.*

* * * * *

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis. The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to

them and they desired to continue as customers of Parke, Davis. *There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.*